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# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

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AMERICAN - HAWAIIAN STEAM-  
SHIP COMPANY, a corporation,  
owner and claimant of the steamship  
VIRGINIAN,

*Appellant and Cross-Appellee,*  
vs.

STRATHALBYN STEAMSHIP COM-  
PANY, LTD., a corporation,  
*Appellee and Cross-Appellant.*

AMERICAN - HAWAIIAN STEAM-  
SHIP COMPANY, a corporation,  
owner and claimant of the steamship  
VIRGINIAN,

*Appellant and Cross-Appellee,*  
vs.

STRATHALBYN STEAMSHIP COM-  
PANY, LTD., a corporation, as  
bailee of a cargo of lumber consist-  
ing of 3,563,011 feet, and for the  
use and benefit of the owners and  
insurers of said cargo,

*Appellee and Cross-Appellee,*

STRATHALBYN STEAMSHIP COM-  
PANY, LTD., a corporation,

*Appellee and Cross-Appellant.*

In Admiralty

No. 2728

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## Brief of Appellee and Cross-Appellant.

HUFFER & HAYDEN,  
W. H. HAYDEN,  
F. A. HUFFER,

*Proctors for Appellee and Cross-Appellant.*



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## STATEMENT OF CASE.

January 15, 1912, the cross-appellant herein filed its libel in a cause of collision in the District Court of the United States for the Western District of Washington, Southern Division, against the appellant herein, and in due course the steamship *Virginian* was seized and subsequently released upon stipulation and bond. Thereafter, the appellant answered and cross-libeled the *Strathalbyn*, which was attached and subsequently released upon bond. On February 8, 1912, the *Strathalbyn Steamship Company, Ltd.*, as bailee of the cargo, the appellee herein, filed a libel against the steamship *Virginian* in said District Court, and the *Virginian* was duly attached and released upon the usual bond. Thereafter, the appellant herein, as owner of the *Virginian*, cited the *Strathalbyn* into the case, by petition, under the 59th admiralty rule, and the *Strathalbyn* was duly attached and subsequently released upon bond.

It appears from the pleadings herein that the *Strathalbyn* left Tacoma, Washington, for Australia, fully loaded with lumber, January 12, 1912, at about 6:15 p. m., by the bridge time.

The pleadings further show that the *Virginian* left Seattle, Washington, bound for Tacoma, with about 2,000 tons of cargo aboard, at about 6:40 p. m.; that the *Strathalbyn* proceeded on her voyage

to Robinson Point, where she took a course of north-west a half north magnetic for Pully Point; that the Virginian proceeded on her voyage to Pully Point, where she took a course of southeast a quarter south magnetic for Robinson Point (Duffy's evidence is that the course was southeast a half south (App. 1157); that the Virginian and Strathalbyn came into collision at about the hour of 45 minutes after 7, according to the Strathalbyn's bridge time. The evidence shows the collision occurred at 7:58 by the engine room time of the Virginian, and at 7:38 by the engine room time of the Strathalbyn, there being twenty minutes difference in the engine room time of the two vessels. When the Strathalbyn was swinging out of Tacoma harbor, she was met and passed, on the Strathalbyn's starboard, by the steamer Daring. When the Strathalbyn was rounding Brown's Point and had taken her course up Sound, she was met and passed, on the Strathalbyn's starboard, by the Indianapolis. When the Strathalbyn was rounding Robinson Point and was on her way towards Pully Point, she was overhauled and passed, on her starboard side, by the Indianapolis. When the Strathalbyn was rounding Robinson Point, she saw the Flyer and Virginian to the north of Pully Point, and observed the Flyer pass under the stern of the Virginian to starboard and overhaul and pass the Virginian, on the Virginian's starboard side,



in the vicinity of Pully Point. The Strathalbyn was making about 6 knots an hour. The Flyer was making 14 1-2 knots an hour. The Virginian was making 11 knots an hour. The distance between Robinson Point and Pully Point is 3 3-4 knots. The Flyer passed the Virginian at or before reaching Pully Point. The Flyer passed the Strathalbyn about midway between Pully and Robinson. When the Flyer overtook the Virginian, the Flyer blew one short blast, and directed her course to her own starboard, after the Virginian answered with one short blast. The Flyer passed the Virginian 200 or 300 feet to the Virginian's starboard. When passing the Virginian, the Flyer saw the Strathalbyn between Robinson and Pully Points and held her course, for a time, somewhat to the westward of her usual course until she was clear of the Strathalbyn. When the Flyer was something over half a mile from the Strathalbyn, the Strathalbyn blew one short blast, indicating she would pass the Flyer on the Strathalbyn's port. The Flyer answered with one short blast, and the vessels passed each other from 250 feet to a quarter of a mile apart. When the Strathalbyn was from 1,200 to 1,500 feet forward and off the Flyer's port bow, she blew one short blast to the Virginian and ported her helm, directing her course to starboard, the Virginian, at that time, bearing substantially dead ahead of the Strathalbyn,

and being in the neighborhood of a mile off, the Strathalbyn being about half way between Robinson and Pully Points when first signalling to the Virginian. At the time the Strathalbyn first blew and ported, the red and green lights of the Virginian were seen from the Strathalbyn. The Virginian failed to answer the Strathalbyn's porting signal. After giving the Virginian reasonable time to answer, estimated at about a minute, the Strathalbyn again blew one short blast to the Virginian and stopped her engines. The red light of the Virginian closed. The Strathalbyn blew another single blast, making the third to the Virginian, and backed full speed astern. The Virginian failed to answer the Strathalbyn's third single blast. The Strathalbyn sounded four danger signals, the Virginian then having approached until she was about 800 feet from the Strathalbyn. The Virginian blew three blasts in answer to the danger, this being the first whistle out of the Virginian to the Strathalbyn. Prior to the collision, the Strathalbyn had stopped so that she no longer had steerage way. But a few seconds elapsed between the Virginian's three short whistles and the collision. When the Virginian's three short whistles were blown, the pilot on the Strathalbyn observed the Virginian's propeller commence to back and throw the water under her counter. The Strathalbyn had swung from her course until she was



headed well into the bight to the eastward of Pully Point. The *Virginian* struck the *Strathalbyn* on the port bow, her stem crossing the *Strathalbyn's* stem, the *Strathalbyn* having a list of 6 degrees to starboard. The stem of the *Virginian* carried away the upper part of the stem of the *Strathalbyn* above the 29-foot mark, bent her port plating forward of the hawse pipe on the port side around to the starboard side, bent the stem and plating below the 29-foot mark to port, and coursed through the bow of the *Strathalbyn*, cutting out her fore peak, entering the sailors' quarters on her starboard side, injuring and killing some of the men in those quarters, and left the *Strathalbyn* just aft of her collision bulkhead, some 30 feet from her stem, on the starboard side. On the heavily laden *Strathalbyn*, the blow of the collision was severe, and caused her to list to starboard. Some aboard of her were jarred, and the pilot's arm was injured by being jolted up against the telegraph. The vessels were together a very short time, when the *Virginian* backed out of the wreckage. The *Virginian* swung very little to port, if any. The *Strathalbyn* swung, or continued her swing, to starboard.

The *Virginian* contends the side lights of the *Strathalbyn* were invisible and that the masthead light could not be seen, and that the *Strathalbyn*

was negligently navigated. The evidence shows that the stanchions, timbers 6 x 10 inches in diameter, holding the forward cargo of the Strathalbyn were higher than, and extended above, the side lights, which were located in their proper screens, just above the chart room deck. The Virginian, in approaching the Strathalbyn, alleges that when the Flyer was an eighth of a mile ahead of the Virginian, the Strathalbyn blew one short blast to the Flyer, which was answered by the Flyer; that, about a minute thereafter, the Virginian heard one short blast "from some point ahead and to the port side of the steamer Flyer"; that the Virginian then stopped her engines; that the pilot searched with his glasses for the Strathalbyn, but neither he nor the third officer, who was on the bridge, could see any lights of the Strathalbyn, and the lookout reported none; that, "from some point ahead," another short blast was heard, when the Virginian's engines were reversed full speed astern; that the pilot and officers continued to search for the object ahead, but could see no lights nor the outline of her, and then heard four blasts from a point ahead, which were immediately answered by three blasts from the Virginian, signifying "that her engines were going full speed astern"; that thereafter and within a few seconds, the Strathalbyn loomed out of the darkness immediately in front of

the *Virginian*, and the two vessels forthwith came into collision, "head-on, or nearly so", the *Virginian* being struck on her starboard bow, just abaft her stem, listing her to port; that the *Virginian* had been reversing full speed astern about two minutes or more before the collision, and immediately after the collision began backing from the *Strathalbyn*. The *Virginian* only heard two passing blasts from the *Strathalbyn* but heard the passing blast given by the *Strathalbyn* to the *Flyer* and the *Flyer's* reply. The *Virginian* contends that her silence and failure to answer the passing blasts signified that her officers could not see the *Strathalbyn's* lights. Just prior to the collision, the pilot and third officer were on the bridge of the *Virginian* and a lookout forward. After the telegraph signalled to the engines of the *Virginian*, her master came from his room out to the bridge. Prior to the collision, the first mate and pilot were on the bridge of the *Strathalbyn* and a lookout was on her bow. After the *Strathalbyn* blew to the *Virginian*, her master came on the bridge.

The *Strathalbyn* charges the *Virginian* with the following faults:

- (1) Having an insufficient lookout, and failing to see the *Strathalbyn's* lights;
- (2) Failure to answer the *Strathalbyn's* porting whistles;

(3) Failure to sound her danger whistle when the *Virginian* was in doubt of the course and direction of the *Strathalbyn*, after hearing the *Strathalbyn's* passing whistle or whistles;

(4) In failing to stop and reverse earlier than within a minute before the collision;

(5) Taking a course to port instead of to starboard after hearing the *Strathalbyn's* passing whistle;

(6) Failing to direct the *Virginian's* course to starboard upon hearing the *Strathalbyn's* passing whistles, under the rule that such a course would have been good seamanship under all the circumstances known to the pilot of the *Virginian*, and would have avoided the collision, even granting the *Strathalbyn's* lights were invisible.

The *Strathalbyn* contends she was not in fault:

(1) Because her lights were proper;

(2) Because she blew the proper passing signals when the vessels were approaching;

(3) Because she ported her helm in accordance with the rule;

(4) Because she stopped when she saw the *Virginian* commence to swing her head to port;

(5) Because she reversed in accordance with the

rule when the vessels had approached so that there might be danger of collision if she did not do so;

(6) Because she blew her danger signal when it appeared that the Virginian would not change her course to starboard, and if she did not do so a collision would occur; and,

(7) Because the Strathalbyn had stopped so as to have practically no headway before and at the time of the collision.

The question of the damages to the Virginian and Strathalbyn has been settled by agreement between the parties.

The question of the liability of the Strathalbyn for damage to her cargo is contested by the Strathalbyn on the ground that, under the charter party, the charterer employed the pilot and relieved the Strathalbyn of all liability for loss or damage occurring by reason of collision and is estopped from recovering any part of the loss of the cargo from the Strathalbyn by reason of such provision, and, in the consolidated causes, judgment should be given against the Virginian only for one-half of the cargo loss, without right of the Virginian to recoup any part thereof from the Strathalbyn.



THE CROSS-APPELLANT ASSIGNS THE FOLLOWING  
ERRORS TO THE HONORABLE DISTRICT COURT'S  
FINDINGS AND DECREE, VIZ.:

## I.

That the court erred in finding and decreeing that the collision mentioned in the pleadings herein between the steamship *Virginian* and the steamship *Strathalbyn* resulted from, or was caused by, the mutual fault of the steamship *Virginian* and said steamship *Strathalbyn*, and in refusing to find and decree that said collision resulted from the sole fault and negligence of the steamship *Virginian*.

## II.

That the court erred in finding and decreeing that, in said causes, the damages to the steamer, demurrage and layup expenses and matters of such nature resulting from the collision mentioned in the pleadings, and costs, should be divided.

## III.

That the court erred in refusing to allow, award and decree to the *Strathalbyn Steamship Company, Ltd.*, a corporation, libellant and claimant in cause No. 1036, the full amount of damages sustained by it as the result of the collision between said steamer and the steamer *Virginian*, together with interest thereon and its costs of said suit as prayed for in the libel herein.



## IV.

That the court erred in finding the lights of the steamer Strathalbyn were not properly set and burning and visible to the Virginian.

## V.

That the court erred in finding the angle of the approach of the Strathalbyn and Virginian was such that the red light of the Strathalbyn was not visible to the Virginian, and that it was hidden from the Virginian during the time the Strathalbyn was signalling to the Virginian.

## VI.

That the court erred in giving more weight to the negative testimony of the witnesses that they did not see the lights of the Strathalbyn than to the positive testimony of witnesses that the lights of the Strathalbyn were visible from directly ahead prior to, at the time of, and after the collision.

## VII.

That the court erred in finding that the stanchions holding the cargo on the Strathalbyn's forward deck did not tumble home and lean inboard from a perpendicular position, and that the port light could not be seen by sailors aboard the Strathalbyn from the deck of the Strathalbyn through the spaces between the stanchions.

## VIII.

That the court erred in finding that the stanchions holding said deck cargo of lumber on the Strathalbyn leaned outboard slightly instead of inboard at the time of the collision.

## IX.

That the court erred in finding that the stanchions obstructed the rays of the port light of the Strathalbyn so that the same could not have been seen on the Virginian from the angles at which the steamers were approaching during the time the Strathalbyn was signalling to the Virginian.

## X.

That the court erred in finding that the Flyer in overhauling and passing the Virginian at Pully Point, when abeam, was two hundred (200) yards away from her.

## XI.

That the court erred in finding that, because the rays of light from the side lights shone upon the stanchions holding the forward deck cargo on the Strathalbyn, the light was so obstructed at a point directly ahead that it was not visible from the Virginian.

## XII.

That the court erred in finding that the Strathalbyn and Virginian were on like courses and struck head-and-head at the time of the collision.

## XIII.

That the court erred in finding the Virginian was not at fault in failing to observe the masthead light of the Strathalbyn during the time the Strathalbyn was signalling to the Virginian.

## XIV.

That the court erred in finding and decreeing that the Strathalbyn Steamship Company, Ltd., as bailee of the cargo of lumber recover more than one-half of the cargo damage and costs in the consolidated causes.

## XV.

That the court erred in decreeing that the Strathalbyn Steamship Company, Ltd., libellant in cause No. 1036, be required to recoup the American-Hawaiian Steamship Company, claimant and cross-libellant in said cause 1036, for one-half of the cargo damage and costs decreed to be due the Strathalbyn Steamship Company, Ltd., as bailee, in cause No. 1052.

## XVI.

That the court erred in failing to find and decree

that the charter party made and entered into between the charterer of the Strathalbyn and cargo owners saved and protected the Strathalbyn against the claim of the charterer and cargo owner from any loss or damage resulting from collision.

### ARGUMENT.

Assignments of error I., II., III., IV., V., VI., VII., VIII., IX., XII. and XIII. all concern the visibility of the Strathalbyn's lights. If the lower court was correct in holding the Strathalbyn's lights obstructed in a way to be a factor in bringing about the collision, then the Strathalbyn is liable at least for half the damage. As in most collision cases, the testimony of the crews of the two vessels is such as to place fault on the other. The presumption is that the testimony of the crew as to what took place on the vessel to which they are attached is entitled to more weight than the testimony of the crew of the other vessel. Against this presumption is another presumption that careful and attentive navigators see what is visible and hear what is audible. The presumption of the truth of the testimony of all the crew of the Strathalbyn that her lights were brightly burning and visible, is brought in direct conflict with the presumption of the truth of the testimony of the lookout and officers of the Virginian that the Strathalbyn lights were invisible to them. Possibly we can

eliminate, therefore, the testimony of the crew of the *Virginian* and of the *Strathalbyn*, and seek for the truth in regard to the *Strathalbyn's* lights from disinterested eye-witnesses who testify they saw her lights at different and various times during the few hours from about 5:30 o'clock, when they were put out, until she arrived back in Tacoma, after the collision, in the early morning of the next day. If the side lights of the *Strathalbyn* were not simultaneously visible from directly ahead when her cargo of lumber was fully loaded, then merchants, traders and business men and ships' captains of Tacoma and Seattle are each and all guilty of perjury (and there are so many of them that it must be wholesale perjury), for they testify that both the *Strathalbyn's* lights were simultaneously visible from ahead, and if this testimony is false, there is no extenuating circumstance to excuse the positive and unequivocal statements of these witnesses.

There are really only two points that need to be determined in favor of the *Strathalbyn* to clear her entirely from liability:

First, that her lights were visible to the *Virginian*;

Second, that her navigation was proper when the *Strathalbyn* and *Virginian* were approaching.

Directing our attention to the testimony concerning the visibility of the lights, very briefly we will state the substance of the evidence of the various witnesses, in somewhat chronological order, from the commencement of the voyage of the Strathalbyn until her return to Tacoma.

1. The Strathalbyn was anchored off the Yacht Club grounds, at the head of the bay, in Tacoma, a little to the northeastward of the buoy maintained by the City of Tacoma for the use of vessels on such anchorage grounds. Capt. Strand was the keeper of a number of private yachts anchored off the Yacht Club house, which club house was located across a five hundred-foot waterway at the outer end of the Northern Pacific fill and about opposite the Commercial Dock and the wagon and foot bridge leading from Pacific Avenue across the railroad tracks to the Commercial Dock. It was Strand's duty to see to the safety of these private yachts, and to place riding lights on them. This he had done on the night that the Strathalbyn was preparing to leave for sea, and had walked up the steps from the roadway which passes the Foss boathouse, where he had left his boat, onto the bridge. When there, and about six o'clock p. m. (App. 466), he met a longshoreman, and they engaged in conversation about the Strathalbyn (App. 464). While so engaged in conversation, Strand



leaned his elbows on the railing of the bridge and was facing the water and looking at the Strathalbyn, which was lying north of him. The Strathalbyn was then at anchor and so swinging, through the influence of the wind and the tide, that, at times, she was heading directly for the bridge (App. 467). Her side lights were placed and her masthead light raised at about 5:30 p. m. (App. 307), and while the Strathalbyn was raising her anchor preparatory to going to sea. As the Strathalbyn swung, her red and green lights were visible to him, as well as her masthead light, and he saw both the red and green lights at the same time (App. 468). This is conclusive that the lights could be seen from directly ahead. Strand was about a quarter of a mile away, and at an elevation of about 40 feet above the water. This elevation is substantially the same elevation as the bridge of the Virginian (App. 834). While the Strathalbyn was so swinging at her anchor and was so observed by Strand, she was heading in a southerly direction, almost due south. There is not a word in the testimony attacking the veracity of Strand. His position of trust among the best people in Tacoma, caring for their property, at least should tend to make him a credible witness. At the time he testified, he was acting as mate for the United States Whaling Company on one of its whale-hunting vessels, and he has, since his testimony, received

honorable mention for bravery in rescuing and saving lives of shipwrecked people.

2. The next witnesses who refer to the Strathalbyn are those on the Daring, after the Strathalbyn is under way. It appears from the testimony of Wm. H. Smith, first officer (App. 1279), that, at the time he observed her lights, viz., when the Daring was half-way between Brown's Point and the Northern Pacific Dock and the Strathalbyn was about one-half a mile from and across the City Waterway, the Strathalbyn was swinging out of Commencement Bay (App. 1283-1284), crossing the bow of the Daring, which was coming from Brown's Point to land at the Northern Pacific Oriental docks. The starboard sidelight of the Strathalbyn was not seen by anyone on the Daring until abreast of that light (App. 952), nor did they notice her masthead light until within 300 or 400 feet of her (App. 970). Capt. McDowell did not notice if he could see the masthead light. It is not clear from the testimony of these witnesses that the Strathalbyn was not swinging to starboard and leaving her anchorage from a southerly direction when seen from the Daring, which was coming into Tacoma harbor on a south-southeast course, because all the Daring's crew do not place the Strathalbyn in the same position when first seen. McDowell places her well out towards the middle of the bay, about half way to Brown's Point. The Strath-

albyn's green light would not be visible to the Daring until the Strathalbyn had swung to a course of southwest, when her light would just commence to show 2 points abaft the beam, and, in order for the light to fully show, the Strathalbyn would have to be on a course of west-southwest. From this point, both the range and masthead lights would then be seen directly off the beam of the Strathalbyn. If, however, the Strathalbyn had finished her swing and was heading out towards Brown's Point, then the testimony of the witnesses from the Daring that they did not see the Strathalbyn's starboard and masthead lights until the Daring was abeam of the Strathalbyn cannot be taken seriously against the Strathalbyn. The lights were visible at a very much less angle. The testimony of Capt. Penfield, of the Indianapolis, is that the green light did not commence to fade until within three-quarters of a point off the Strathalbyn's bow (App. 982). Something must, therefore, have obstructed the lights from the view of the people on the Daring other than the stanchions. One of the witnesses from the Daring testifies that he judges the Strathalbyn was still engaged in hauling up the anchor, from the quantity of steam that was coming from her forward winch, and, as the wind, what little there was of it, was from a southwesterly direction, it would hold the steam so that it might obstruct the light (App. 962). We simply suggest this to

reconcile the testimony of the Daring's officers and the testimony of Capt. Penfield. The Daring's crew testify the lights were dim. This is so far in conflict with the actual seeing of the lights by others that we must also accept the explanation that the steam obscured the lights. The testimony of the Daring simply brings out, in a pointed way, the impossibility of drawing an inference that lights could not be seen from the testimony of witnesses that they did not see a light or lights. Capt. Penfield testifies that the green light did not begin to be obstructed until within three-quarters of a point off her bow, when it commenced to get dim (App.982), whereas the Daring's testimony is that it was not seen until some 10 points off her bow.

3. The next to observe the Strathalbyn was Capt. Penfield and the helmsman on the Indianapolis. As the Strathalbyn was coming out of Commencement Bay to round Brown's Point, her starboard side would be exposed to view to a vessel at Dash Point. When the Indianapolis was at Dash Point, the Strathalbyn was coming out from under the headland of Brown's Point, and was a mile or more away. Penfield, master of the Indianapolis, there saw her masthead light moving across the lights of the city. He testifies he did not see her green light until she was about a quarter of a mile off (App. 977), when he picked it up with the glasses, practically ahead, and that, in his

opinion, the Strathalbyn was heading off from his course a little to westward, and he saw the green light about a point and a quarter off his starboard bow, so that the green light would be obstructed to the extent of about a point and a quarter from ahead. He never was in a position to see the red light.

4. The next time the Strathalbyn was seen was by Capt. Penfield and helmsman on the Indianapolis' return trip to Seattle from Tacoma and after the Strathalbyn had passed Robinson Point, when she was overhauled by the Indianapolis about three-eighths of a mile north of Robinson Point (App. 984) and passed again on the Strathalbyn's starboard side. Here Penfield says the green light appeared brighter (App. 982) and was not obstructed to the same extent that it was at Brown's Point (App. 982), although, he testifies, the starboard light commenced to get dim when Penfield was about 3-4 of a point off the Strathalbyn's starboard bow (App. 982). He calls the masthead light dim, but the green light was brighter. The testimony of Penfield is corroborated by his quartermaster at the wheel, except that the quartermaster makes the green light invisible much earlier than Penfield and makes the lights much dimmer than Capt. Penfield.

5. If Capt. Penfield's testimony as to the dim-



ness of the lights is to be relied upon, then the court must entirely disregard the testimony of Mr. and Mrs. Ward, government lighthouse keepers on Pully Point. They saw the Strathalbyn's masthead light when the Indianapolis overhauled her at Robinson's Point. Capt. Penfield testifies that, when he overhauled the Strathalbyn, north of Robinson Point, he came up on her port quarter, changed his course to starboard and passed on the starboard side of the Strathalbyn (App. 993), and that no other ships were in the vicinity at the time this maneuver was enacted (App. 988). Mr. and Mrs. Ward testify they saw the Indianapolis make this maneuver, and that, at the time they saw the Indianapolis make this maneuver, they saw the masthead light of the Strathalbyn, which appeared brighter and larger than the masthead light of the Indianapolis (App. 200). These people had been on Pully Point three years (App. 199), and knew the regular boats plying between Seattle and Tacoma. At the time the Wards saw the masthead lights of the Strathalbyn and Indianapolis, the vessels were over three miles from Pully Point and so far that neither the side lights of the Indianapolis nor the side lights of the Strathalbyn were visible to the Wards. At the time of seeing the Strathalbyn and Indianapolis, the Wards noticed the Flyer and the Virginian to the north of Pully Point. It was the fact that the four vessels were



coming along in this manner that impressed the occurrence on the memories of the Wards. It cannot be said, in the face of this testimony, that the masthead light of the Strathalbyn was dim at the time she was approaching the point of this collision, which took place about 15 minutes after the Wards had seen the lights.

6. The next people to observe the Strathalbyn's lights were the navigators on the *Flyer*. When the *Flyer* was passing the *Virginian*, before reaching or when off Pully Point and before the lookout had reported the lights of the Strathalbyn, the *Flyer's* master, Capt. Burns, had seen the Strathalbyn's masthead light (App. 185) and another light aboard her, which he says was the range light, and kept his course to clear the Strathalbyn and navigated the *Flyer* in view of the bearing of the Strathalbyn's light from him which was substantially over his stem. At this time, the *Flyer* was to the westward and only about 200 or 300 feet from the *Virginian* (Cross-libel, App. 12-834). The *Virginian* was between the *Flyer* and Pully Point. When the Strathalbyn was seen by the Wards, she had taken her course to pass Pully Point to the westward. Therefore, the range of the Strathalbyn's masthead light was sufficient to show on Pully Point, and, being sufficient to show to the *Flyer* to the westward of the *Virginian*, brought the *Virginian* in range of her mast-

head light. Nevertheless, the Virginian's crew and lookout (with the exception of McLeod, her third officer, on the bridge,) testify that they did not then, nor at any time afterwards, before the collision, see the Strathalbyn's masthead light. They did not see that which was perfectly patent and visible to the navigating officers, quartermaster and lookout of the Flyer, as well as to some of her passengers. Capt. Burns testifies he did not notice the Strathalbyn's red light when passing the Strathalbyn. He attributes his lack of recollection of seeing the red light to the fact that he paid no particular attention to the Strathalbyn after he had shaped his course to pass her.

7. Passengers on the Flyer saw the Strathalbyn's lights. One was Capt. Milnor, an ex-sea-captain, who was getting along somewhat in years. Capt. Milner left the bright lights inside the cabin, and, getting on deck, observed the Strathalbyn as she was approaching the Flyer and saw two white lights upon her, one of which he testifies was the masthead light (App. 189). He does not recollect seeing the port light, and, in this respect, his recollection is the same as that of the officers and lookout of the Flyer. He attributes his difficulty in seeing this red light to the possibility that the cabin lights of the Flyer shining out along the line of his vision may have interfered with his so doing. He saw the masthead and green side light when the

Flyer returned to the Strathalbyn after the collision (App. 190). He was one of the witnesses who observed the Strathalbyn as the Flyer was proceeding on her way to Tacoma, and noticed then her port light and masthead light burning brightly (App. 584). Another passenger was a Mr. Beaumont. At the time he gave his testimony, he was a traveling salesman for a machinery house in Seattle. At the time of the collision he was installing an oil plant for the Milwaukee Railroad in Tacoma. Mr. Beaumont's experience prompted him to observe lights of vessels which he should be approaching at night (App. 719). He had been the manager of ocean tugboats and also collector of customs at Morgan City, La., and it was his duty, while so engaged, to see to the equipment and lights of vessels (App. 722, 723). He was sitting on the seat running around the forward part of the Flyer's cabin, to starboard of amidships, where he had an unobstructed view ahead. After the Flyer has passed the Virginian, (and four or five minutes before the Strathalbyn and Flyer exchanged whistles, he saw the Strathalbyn's masthead light, her red and green lights and the red light of Robinson Point (App. 717, 718). The Strathalbyn was a little to the eastward of the line between the Flyer and the red light of Robinson Point, at this time. Mr. Beaumont observed those lights for some little time, when, by reason of the approaching of the

vessels and their change of position, the green light disappeared (App. 718). Mr. Beaumont is a reputable man. Every detail of his statement is corroborated by some other witness either for the Virginian or Strathalbyn. Another passenger on the Flyer who was forward when the lookout reported the lights, and standing a little on the starboard side forward of the cabin of the Flyer, was Mr. Hofstetter. Mr. Hofstetter is a young, energetic merchant, conducting one of the largest harness manufactory and retail stores and gun and sporting goods stores in the City of Tacoma. He was returning from Seattle, where he had been directing the basket-ball squad of our local Y. M. C. A. in their contest with the Seattle Y. M. C. A.'s team. He testifies that, as the Strathalbyn was approaching the Flyer, and from a half to three-quarters of a mile off, he saw the Strathalbyn's masthead light and her red and green lights (App. 593-596). Nothing is given in the evidence to shake or disturb this statement of Mr. Hofstetter. His testimony is corroborated by others, and is consistent with the whole situation. His standing in the community is one of excellence. Mr. Beaumont and Mr. Hofstetter are absolutely disinterested from any standpoint. Have they wilfully perjured themselves? Their testimony is, without doubt, clean-cut, positive and indicates no doubt whatever. The occurrence of a collision necessarily impressed the

circumstances leading up to it on their minds. They remarked, at the time, that they couldn't understand how a collision could occur when all the lights were visible and so distinctly seen. In addition to the testimony of Mr. Beaumont and Mr. Hofstetter (who were the only passengers we could find who were on the forward end of the boat prior to the Strathalbyn and Flyer exchanging whistle to pass) was that of a Mr. McIntyre, a man familiar with seafaring life and one of the managers, among other things, of Sims & Levy, sailors' boarding-house men on Puget Sound. Mr. McIntyre had furnished some of the firemen for the Strathalbyn before the Strathalbyn left on this voyage. He is interested to that extent. His testimony is supported by the testimony of others. The court can have no reason to disregard it, unless the court disregards, as false, the testimony of ten disinterested witnesses together with the testimony of the Strathalbyn's crew. Mr. McIntyre has been in business in the Northwest for a number of years. He comes from one of the old-time families engaged in maritime work in this section of the country. If Mr. McIntyre's reputation for truth and veracity were not A1, the Virginian would not have had the slightest difficulty in discrediting him. Mr. McIntyre testifies that when the Flyer whistled and was passing the Virginian, he stopped reading his paper, got up and looked outside to see



what was going by. His business naturally interests him in the movement of vessels. He went back and picked up his paper and was busily reading it, when he heard the Flyer's whistle blow one short blast. He went out on deck. He observed the Strathalbyn approaching off the Flyer's port bow. There he saw her by seeing her masthead and red lights (App. 121) and heard the Strathalbyn blow a port passing whistle and another when off the Flyer's port quarter (App. 125). His curiosity satisfied, he went back into the cabin and sat down, when he heard the danger signals. Immediately went outside and saw the Strathalbyn and Virginian come together (App. 126). Mr. Swanson, one of the basketball team, happened to be outside on the Flyer's deck at the time these vessels were meeting. He noticed the Strathalbyn quite a time before she whistled to the Flyer, and probably a mile to a mile and a half away (App. 623). He testifies that he saw the Strathalbyn's red light burning as well as her masthead light from one and a half to two miles before the Strathalbyn reached the Flyer and when the Strathalbyn was passing the Flyer (App. 623).

8. The next witness who saw any light aboard the Strathalbyn before the collision is McLeod, the third officer on the Virginian. He testifies he saw the masthead light on the Strathalbyn before the



collision, when just on top of the Strathalbyn (App. 130), too close to avoid the collision (App. 892). This is his conclusion. This admission that the Strathalbyn's masthead light was seen burning prior to the collision by one of the Virginian's navigating officers on the bridge makes one ask: Why was it not seen by any other officer on the bridge prior to the collision or by the look-out, who was 200 feet nearer than McLeod? McLeod was not using glasses. Duffy says he (Duffy) was, in an attempt to pick up the Strathalbyn. The repeated whistles of the Strathalbyn directed attention to the position of the lights. We cannot believe they were not seen much earlier by others on the Virginian.

9. The next testimony that the Strathalbyn's lights were burning comes from the Virginian's crew witnesses. They all state that, immediately after the collision, and when the Strathalbyn was about abeam of the Virginian, they saw the Strathalbyn's red light (App. 130, 851, 872, 892). McLeod says, in answer to Mr. Hughes' questioning: "Was it bright or dim? A. It was not very bright, but it was a light we ought—" when he was interrupted by Mr. Hughes with the question: "Q. Bright enough to be seen?" to which he answers: "A. I could not say how far you could see it." (App. 132). When later asked by Mr. Hayden

how far he estimates he could have seen the Strathalbyn's red light, McLeod parries the question by answering: "A. Well, it appeared to me a light that you could see a little distance without being obscured." (App. 132).

10. The next to see the Strathalbyn's lights is the *Flyer* again, which, immediately upon the collision occurring, swings to port and comes up to the damaged vessels as quickly as it can. As it approaches the Strathalbyn and gets into a position 2 points abaft the beam, her officers and passengers see the Strathalbyn's green light burning, as well as her masthead light (App. 181, 818, 820, 821, 822, 190, 595, 625, 721). The *Flyer* started back to the vessels when the danger signal blew.

11. The next time the Strathalbyn's lights are seen by a number of people is when the *Flyer* has hauled away from the Strathalbyn and is on her voyage again to Tacoma. Naturally, all the excitement of the collision is not over. The passengers on the *Flyer* still have a lingering interest in the two vessels left behind. They stand, as the *Flyer* draws away, and watch the Strathalbyn and *Virginian*. The Strathalbyn has swung her head around to port, describing a circle, and is headed in for the land under Robinson Point. The *Flyer* is headed for Robinson Point. The people on the *Flyer* again see the Strathalbyn's masthead light,

on some of them her port and starboard lights simultaneously (App. 584-684).

The next to see the Strathalbyn's lights are two operatives of the small gas boat Salmora. They approach after the Flyer has left the Virginian and Strathalbyn and while the Strathalbyn is swinging from her course towards Seattle to go on the beach at Robinson Point. They saw the Strathalbyn's port light about a quarter of a mile away (App. p. 922), and did not see her masthead light until abreast of the Strathalbyn. They say they were very dim oil lights, and when the Strathalbyn opened her red light she was heading towards Robinson Point (App., p. 1088); that the masthead light looked like it was shining over the Strathalbyn's side (App., p. 1089); that they didn't see the Strathalbyn's masthead light until they were about abeam; that it appeared to be dim and smutty; that they could see it 300 feet. They think the red light would have been visible from half a mile to a mile (App., p. 1103); that the masthead light on the Strathalbyn could have been seen from dead ahead (App., p. 1108). These observations were made after the collision. This was at the time the Flyer was leaving the Strathalbyn. Witnesses on the Flyer saw the lights so condemned by the Salmora witnesses until Robinson Point cut them out. The surmise and con-

clusion of the Salmora's witnesses are refuted by the actual observation by the Flyer's witnesses; and Capt. Penfield's conclusion that the Strathalbyn's masthead light was dim is refuted by the actual observation of the Wards. The conclusion of these witnesses must give way to the superior evidence of actual observation.

And now the Strathalbyn is left alone, in company with the Virginian. The Virginian follows the Strathalbyn from the point of the collision until the Strathalbyn gets in the vicinity of Robinson Point, when the Virginian hauls ahead for Tacoma. Yet, during all this time, the officers, pilot and crew of the Virginian (that is, so many of the crew as are called, and only the lookout, pilot, first mate and master are called on this point,) all testify that they did not see the port light of the Strathalbyn, that they saw a light which they thought was the masthead light, but, on subsequent consideration, were doubtful of the fact; that all the lights they did see were dim, swinging, flaring up and fading out. This is undoubtedly accounted for by the fact that the Virginian was following the Strathalbyn and did not pull ahead of her until the Strathalbyn rounded in to the beach at Robinson Point (App. 1165-1166). Every other witness says the Strathalbyn's lights were steady, did not flare up or go out. Oil lights

surely don't act that way, for if they go out there is no way to immediately light them.

12. The next seen of the Strathalbyn's lights was when Mr. Macquarrie, Mr. Leach and the crew of the launch, which went out from Tacoma to the vessel after word had been conveyed to them that there had been a collision in which the Strathalbyn figured. Of course, these people on the launch were searching for the Strathalbyn. They were intent on picking her up. They didn't know where she was. When the launch got somewhere between Dash Point and Brown's Point, a red light was seen in the direction of Robinson Point, which red light was large and bright. Mr. Leach and Mr. Macquarrie were on the forward end of the launch, looking for ships' lights. They spoke about the red light, and thought, at first, that this red light was Robinson Point light. On closer observation, they noticed the masthead light above it, and then knew the lights were the lights of a vessel, and directed the course of the launch to the vessel (App. 633, 636, 648). The launch-boys all testify that, during this passage from Dash Point to Robinson Point, they saw the masthead light of the Strathalbyn and her red and green lights simultaneously (App. 114, 118, 134). Mr. Leach and Mr. Macquarrie both testify that they do not believe the Strathalbyn was so headed at that time that these lights would have been vis-



ible. They do not recollect seeing the green light and red light at the same time when the vessel was off in the direction of Robinson Point. But, be that as it may, Mr. Leach, with the launch-boys, left the Strathalbyn in the vicinity of Dash Point and came with the launch to put a light on the Milwaukee Dock (App. 637, 649), it being surmised at the time that the Strathalbyn would not remain afloat, and that they would run her on the mud flats near the Milwaukee Dock. After placing a light and one of the launch-boys on the Milwaukee Dock, Leach returned to the Strathalbyn, and saw her as she was coming around Brown's Point (App. 649). When in the neighborhood of a half a mile away, the Strathalbyn swung into such a position that she was directly head on to the launch, and Leach then saw both the red and green light of the Strathalbyn simultaneously (App. 649, 650). After reaching the Strathalbyn, Leach was informed that it was not necessary, in the opinion of the pilot, to place the steamer on the mud, and he was directed to take the launch, pick up the boy on the Milwaukee Dock and the light, and to go to the buoy in the bay and take a line with which to make the Strathalbyn fast to the buoy. He did so; and, when upon the buoy and the Strathalbyn was bearing down upon it, he again saw both the red and green light on the Strathalbyn simultaneously (App. 650).



When the Strathalbyn reached Tacoma harbor, the men on the launch wanted to see the damage. Cawley, the launchman, tied her up alongside the port side of the Strathalbyn, under and close to her port light, and came aboard the vessel (App. 136). When Cawley was 30 or 40 feet forward on the forward deck cargo of the Strathalbyn, the thought occurred to him that his masthead light might be fouling the ship's boat which had been put over the side of the Strathalbyn and was hanging in the davits. He, therefore, went to the port rail (a board nailed to the stanchions) and leaned over and looked outside the stanchions at his launch and there saw the red light on the outside of the stanchions (App. 136). This shows clearly that the light could be seen directly ahead. The vessel narrows going forward.

Another like instance: Mr. Semruk, a sailor, came out of the forecastle after the collision. He saw one of his companions, injured, leaning over a board rail nailed to the port stanchion. He put his arm around his mate's shoulder, and, as he asked his companion's condition, was facing aft, with head outside of the stanchions. He then saw the red light distinctly (App. 387). These two last-mentioned instances, as well as the instances of the men who were on the small launches or boats at a lower level than the light, show that the crew

who were coming aft on the Strathalbyn and saw the red light between the stanchions were not necessarily looking over the same, as suggested in the opinion of the lower court. There have been so many people who testified to actually seeing the light outside of the stanchions and from directly ahead that it seems the testimony preponderates that it could be seen from directly ahead, notwithstanding any confusion about measurements of the vessel and speculation as to the possibility of the stanchions obstructing the light.

As the Strathalbyn moved from Tacoma to the point of collision and back again, her bridge officers were looking at the lights or their reflections and knew they were burning. The Strathalbyn's lookout, Cameron, reported the lights every half hour (App. 315). He observed the side lights by looking over each side of the vessel from the forecastle head outside of the stanchions. No one was in a better position to know that the lights were unobstructed than Cameron.

Were the Strathalbyn's lights dim? This is an attack made upon them by the Virginian. Their defense is double-headed: First, the lights were obstructed; second, they were dim whether obstructed or not. On the latter point, let us group the witnesses. The Indianapolis condemned them to the extent of saying they were not very bright.

The Salmora says they were very, very dim. The Virginian says they were dim and flickered and flared up and went out. Does this testimony preponderate? We assert it does not. Capt. Penfield, of the Indianapolis, saw the Strathalbyn's masthead light a mile or a mile and a quarter away and as soon as it was visible when rounding Brown's Point. The Wards saw the Strathalbyn's masthead light when she was rounding Robinson Point with the Indianapolis, and it was brighter than the Indianapolis' light. All the navigating officers of the Flyer saw the masthead light burning brightly when the Flyer was rounding Pully Point and the Strathalbyn was off more than half-way to Robinson. The passengers on the Flyer saw the masthead light of the Strathalbyn burning brightly. A number of the passengers on the Flyer saw the Strathalbyn's red light burning brightly before she passed the Flyer. Two of the passengers on the Flyer saw the Strathalbyn's green light burning brightly as the Strathalbyn was approaching the Flyer. Every person on the Flyer saw the Strathalbyn's green light and masthead light burning brightly when the Flyer came back to the Strathalbyn after the collision. All the witnesses who testify to observing the Strathalbyn's lights after the Flyer drew away from the Strathalbyn testify the lights they saw were burning brightly and steadily. The only witnesses produced by

either the Strathalbyn or the Virginian who testify that the lights were not steady are the master, pilot, third officer and lookout on the Virginian. None of the rest of the Virginian's crew was called to testify to this phenomenon, directly contradicted by every other witness in the case. There is no evidence at all that the Strathalbyn's lights flickered, went out or were smoky until after the collision. Penfield does not say that the masthead light flickered, flared up and went out. None of the witnesses testify that the red or green light flickered, flared up or went out. Not a witness supports Duffy, Green, McLeod or the Virginian's lookout in their uncertainty as to whether the light they saw aloft was the masthead light or not. On the contrary, every witness, passengers and all, had not the slightest difficulty in identifying the masthead light of the Strathalbyn. The testimony that the masthead light was dim, flickered up and faded out and could not be distinguished from lights on deck, if it is intended to express a condition at the time of, or before, this collision, is as false as an untruth can be, for the testimony of disinterested witnesses preponderates so enormously against the lights being dim or unsteady at, and just prior to, the collision, that it is impossible to draw any other conclusion than above expressed.

The next day, after the collision of course, the newspapers had an account of the collision, and

Mr. Strand, who had seen the lights the night previous, from the Commercial bridge, having read the newspaper reports, was curious enough to want to see the nature of the damage to the Strathalbyn, and he went out in his rowboat and looked around the bow of the Strathalbyn at this damage. He was the man into whose boat Dyell, the sailor who was killed and encased in the folds of the Strathalbyn's plating, was placed after he was discovered and removed. He looked at this damage, speculated how it could have occurred, lined up the light boxes with the stanchions and saw that everything was clear (App. 482, 484).

A collision having occurred, the next step was to obtain evidence that the stanchions did not obstruct the lights. Therefore, a photographer was engaged to place himself directly ahead the Strathalbyn and take a photograph of her, which would show her stanchions and show the light screens, and depict the true situation. In order for the photographer to get into a position where he could take this picture, the vessel having then been hauled onto the mud flats from the buoy, it was necessary to hire a launch, and this launch was hired, and Capt. Burley went along with the photographer, and they tried to place the launch directly ahead of the Strathalbyn and take a picture of her stanchions and light screens. It was misty and windy,



and the launch was bobbing about and drifted some, and, during the interval between the time the photographer could sight from directly ahead of the Strathalbyn and the picture was taken, the launch drifted a little to the port bow. The lens had become filmed with a haze and the picture was not clear. It has been introduced in evidence with the explanation of the photographer who took it and of Capt. Burley, who was present when it was taken. By the time the picture was discovered to be not clear, the deck cargo had been removed. There was no way of reproducing the scene, except through the aid of verbal testimony of the photographer and Capt. Burley. Both testify that, from a point directly ahead of the Strathalbyn, the light screen was visible, projecting 12 or 14 inches outboard of the stanchions (App. 561, 575).

The next person to investigate the question of the stanchions obstructing the light was Capt. Fowler. He entered the Strathalbyn from a launch, through the damage in her bow, went onto the forecastle head, walked along the cargo on the port side of the Strathalbyn, stepped into the port light box. He also was curious to see if the lights could have been obstructed by the stanchions. He glanced forward, standing in the light box, using the outer edge of the block in the forward end of the light box as his sight. He estimates, and is firm in his



belief, that the stanchions protruded two degrees out beyond a line parallel with that block and the keel. This is the only eye-witness produced by the Virginian. Capt. Fowler was one of the surveyors who prepared the specifications for the repairs to the Virginian. He was on that job until superseded by Mr. McGregor. The writer of this brief has a great deal of respect for the integrity and honesty of Capt. Fowler, and does not believe that he would wilfully misstate any fact. Capt. Fowler was standing up at the rear end of a box three feet long, sighting over a block in the forward end of that box. His eye was directed down and was not on a level with the block or the point on the stanchions on a level with the block. The inside of the Strathalbyn's forward main-deck rail is about 8 inches outside the outer edge of the block. The stanchions were slanted in-board, or tumbled home. Capt. Fowler, looking down across the end of the block, necessarily saw the stanchions below the point on a level with the block. Consequently, he naturally assumed that the stanchions extended out so as to obstruct the light at an angle of 2 degrees. The first stanchion was located some 8 feet forward of the house, and the forward end of the light box was located some 2 feet aft of the forward edge of the house, and the light was located 3 ft. 6 in. aft of the forward end of the light box (App. 521).

The first stanchion was some 13 feet or more forward of the light and 9 or 10 feet forward of the block. The obstruction of 2 degrees measured from the block would not amount to 3 1-2 inches and was so small that the outside of the light projected beyond a line parallel with the outer edge of the stanchion and the keel. The course of the Strathalbyn was changed to starboard on meeting the Virginian. This stanchion could not have obstructed the light as the vessels were approaching each other. The testimony of Capt. Fowler, however, happens to be checked, as it were, by the testimony of Mr. Leach, who sighted aft along the stanchions, on the port side, from the forecastle head, and also by the testimony of Capt. Burley, the photographer and Capt. Strand, who all did the same thing, and they all testify that the light screen was not obstructed; that the rays of the light in it would show directly ahead, thus further corroborating the testimony of all of the witnesses who testify that they saw both the port and starboard light at the same time.

The American Trading Company loaded the Strathalbyn. They had her under charter. Mr. Leach is their supercargo, and Mr. Waadne their foreman of stevedores. Mr. Waadne had charge of putting up the stanchions to hold the cargo on the forward deck. He testifies they had a tumble home of a foot (App. 706). He knows it for two

reasons: First, because he sighted along the stanchions upon the house of the Strathalbyn, and remembers tumbling them home; and, second, because it is his universal custom to tumble the stanchions home, in order to prevent them being spread outboard and to make them stronger when the ship is at sea. An individual custom, supported by a recollection of this particular case (App. 701), it seems should sufficiently prove the fact, in the face of no contrary testimony. The testimony as to how the stanchions were placed by Waadne is corroborated by Leach (App. 651).

The testimony of Capt. Green discloses that he got into a small boat and went around the Strathalbyn in the morning of the day after the collision and looked at her general arrangement; that the Virginian's representative, Mr. Fowler, came over from Seattle and was aboard the Strathalbyn on the morning of the day after the collision. If the real reason for this collision was the obscuration and impossibility of the Virginian's officers to see the Strathalbyn's side lights, it seems marvelously odd that they did not take pictures of the stanchions obstructing the lights. The Strathalbyn took them to show the lights were unobstructed. It was just as easy for the Virginian to take them to show the lights were obstructed. It is impossible to believe that a man of Capt. Green's initiative, knowing

that the collision would bring forth an investigation before the Steamboat Inspectors which would involve his license, should personally neglect the opportunity to clear himself when it only required the operation of taking a snap-shot picture while he was out in the rowboat to produce irrefutable evidence to support his innocence. Not until after the Strathalbyn has gone to sea, has returned to Puget Sound, has been loaded in a different manner, by a different stevedore, by a different company, does the Virginian produce photographs for the purpose of showing the Strathalbyn's lights were obstructed. These photographs were objected to on the ground they did not show a similar condition. They are taken by a camera which was so broad at the base that it could not set in the light box without extending the lens several inches farther outboard than the outer edge of the block in the forward end of the screen. A picture so taken naturally magnifies the outboard appearance of the stanchions. The whole attempt is so unfair that we do not anticipate the court will justify the effort by considering the testimony as having any bearing on the case.

Could the port side light be obstructed and at the same time be seen through the stanchions as well as be seen shining upon the first stanchion forward of the house? On the Strathalbyn, the light screens were so arranged that the red light could be seen

by a man on the forecastle head when standing on the port side or end of the windlass there located (App. 323). The light had an overflow inboard to that extent. The stanchions were 6x10, with the broad side against the rail. The distance between the light screen blocks was 47 feet  $3\frac{3}{4}$  inches. Half this distance is, say, 23 feet 8 inches. Say the base of the windlass is 16 feet 7 inches (App. 543). The length of the forward deck is 101 feet  $9\frac{1}{2}$  inches (App. 530). The windlass was located well forward on the forecastle deck, so that the distance between a man standing at the poop of the windlass and the light screen would be substantially 125 feet, and, when so standing, he would be, say, 9 feet to port from the keel line of the ship. The line of light would, therefore, be drawn from this 9-foot point to the outer edge of the block in the end of the light box. If the stanchion was outside of that line the light would show full upon it. The stanchion was just outside of that line; so that the light did show full upon it, and yet was not obstructed from a point directly ahead. Figures corroborate the testimony of Mr. Cameron (App. 323).

“Q. Could you see the side lights when standing on the poop of the windlass? A. Yes, sir, I could see them showing inside the first stanchion by standing on the poop of the windlass.



- Q. Showing inside the first stanchion? A. Yes, sir.
- Q. The poop of the windlass is in the center? A. No, the barrel of the windlass is the poop.
- Q. Where is that? A. That is on the side of the bow.
- Q. How much is it to one side of the bow? A. I could not judge.
- Q. What is the outside width of the drums, from one to the other? A. I could not tell; I never measured.
- Q. And from that point you could see the side lights? A. Yes, sir.
- Q. Looking back inside the stanchions? A. Yes sir.
- Q. Did you notice them there that evening repeatedly, from that point? A. Yes, sir."

With the above mathematical demonstration, verifying Cameron's testimony, based on actual vision, we submit that the Honorable District Court was in error when he concluded that the stanchion must be outboard of the light screen in order for the rays of the light to shine upon the first stanchion. Capt. Beecher and the other officers on the bridge knew the port and starboard lights were burning prior to, and at the time of the collision, by reason of this reflection or casting of the rays of the light upon the first stanchion.



Referring to the testimony that was introduced in evidence to show that the Strathalbyn's lights were obstructed—a very stupid mistake occurred in connection with the measurements of the Strathalbyn. It was the intention of counsel for the Virginian and for the Strathalbyn to avoid any conflict of testimony as to the measurement of her physical characteristics, the principal measurement being, of course, desired between her light boxes or lights and between her bulwarks just forward of the house. This was a simple measurement about which there should have been no difficulty. For the purpose of getting these measurements accurate and having them certified to, the Virginian selected Mr. Walker as its representative, and the Strathalbyn designated Mr. Jack, who had been making the repairs for the owners of the Strathalbyn, she being then in dock at Esquimalt, B. C. The blue print was stricken off. Prior to Mr. Jack and Mr. Walker making the measurements, a letter was written from the Strathalbyn's counsel to Mr. Jack requesting that a surveyor be obtained with instrument, so that accurate measurements could be made of the Strathalbyn, and telling the measurements desired; whereupon the substance of this letter was conveyed to a man by the name of Cameron, who was an employe of the British Columbia Marine Ry. Cameron, independent of all other surveyors, with his assistant and steel tape, made the measurements

desired. Mr. Lawrence Bogle and Mr. W. H. Hayden accompanied Mr. Walker to Victoria and there met Mr. Jack and Capt. Logan, the latter being employed by underwriters interested in both vessels, and they sojourned to the vessel and started to take measurements. Prior to this trip, evidence had been taken in Tacoma and the signal lamps had been introduced in evidence and were in court in Tacoma. When the measurements were to be taken, it was asserted by the surveyors that the distance between the outer edges of the blocks in the forward end of the port and starboard light screens was the distance between the center of the wicks of the lamps. Counsel for the Strathalbyn did not agree with this statement and asserted that the outside edge of these blocks corresponded with the inside edge of the wicks of the lamps. It so happened that the light boxes were attached to a swinging door in a wooden bulwark or rail around the chart room bridge and that through this swinging door and light box was a hand hole cut just back of the brackets on which the lamps rested, and there was a fair-way across the ship so that the tape could be stretched through the hand holes from the iron brackets in each light box, and counsel for the Strathalbyn suggested that these iron brackets would furnish a definite point from which the measurements could be taken and that the actual and definite distance between the wicks of the lamps

could be ascertained by adding the distance from the outside of the lamps to the edge of the wick to the distance between the iron brackets. This measurement between the iron brackets was, therefore, taken, and the measurement between the blocks abandoned. Cameron knew nothing of this. Cameron constructed or drew a tracing from the measurements that he had obtained, the object being to get the distance between the lights, and placed on the tracing a line extending downward from the outside edge of the blocks in the forward end of the port and starboard light screens, assuming that that was one of the measurements he was to receive from the surveyors. A blue print was taken from the tracing and on this blue print Mr. Jack, from his notes, wrote in the data that was to be incorporated in the blue print, but in the hurry of getting away (he lived in New York,) neglected to notice that the lines above referred to were dropped by Cameron from the outer edge of the blocks. The blocks are each four and one-half inches wide; the bracket was an inch from the inside board of the screen. This made a difference of three and one-half inches in each light box or a difference of some seven inches in the total measurement across the ship. After the blue print was prepared, it came into the hands of Mr. Hayden, who, supposing it was correct and being then extremely busy taking testimony prior to the Strathalbyn's leaving (final

testimony being taken late the night before she sailed,) and being engaged in court with other matters, did not examine this blue print until after the Strathalbyn had left port, and then, when making a copy of the blue print for the use of Virginian's counsel, for the first time noticed that the distance measured between the iron brackets was given as the distance between the outer edges of the blocks. To this he immediately called the attention of Virginian's counsel and asked if the blue print could not be correct, and thereafter counsel for the Strathalbyn was notified that Mr. Walker contended the measurements as shown on the blue prints were correct. This error and the refusal to correct the same compelled the taking of testimony of Capt. Crerar (App. 88) and Mr. Purdy (App. 92) in Liverpool, of Mr. Jack in New York (App. 445), of Mr. Walker in Seattle (App. 1036) and Mr. John Cameron (App. 511) and Mr. Logan in Victoria (App. 490) and Everett (App. 553) and the re-measurement of the ship in Everett, as per survey report in evidence together with the testimony at Everett of Mr. Sandilands (App. 555) and Mr. Gilroy (App. 557), the engineers who had been on the ship constantly from the time she left after the collision until her return to Puget Sound. The sum total of this testimony and the re-measurement at Everett proves that Mr. Walker is in error in insisting that the true distance between the

outer edge of the blocks in the light screens is 46 feet 10 inches, and shows that the true distance between these points is 47 feet  $3\frac{3}{4}$  inches (App. 523-527-528-529), and the true distance between the inboard edges of the bulwark eight feet forward of the house was 48 feet  $7\frac{1}{2}$  inches (App. 531), making a difference between the distance across the ship between the bulwark rails and across the ship between the lights of 1 foot  $3\frac{3}{4}$  inches, or a tumble home on each light screen from the inboard edge of the bulwark rail of 7.87 inches, say 8 inches, on each side of the ship. These errors in recording the measurements on the blue print would probably not have been noticed had not Mr. Hayden at the time made a note of the measurements taken and had he not fixed the distances so clearly and positively in his memory. Under stipulation, Mr. Hayden filed an affidavit as to the measurements taken at Esquimalt, with the privilege of Mr. Bogle, who was also present, to file a counter affidavit. Mr. Boyle made no counter affidavit. If there should still remain any controversy as to the measurements and if the court will believe the testimony of those who saw the lights, the dispute as to the measurements becomes of little or no consequence. There is no question but what the inside of the bulwark rail extended beyond the lights on a line dropped perpendicularly to the extent of say 8 inches. There is no question, either, that the tes-



timony shows that the stanchions were arranged with a tumble-home (Waadne and Leach, *supra*). Mr. Fowler's testimony substantiates this last assertion, when he says that the light would be obscured only about two degrees by the stanchions.

Taking the testimony as a whole, we do not doubt the court will find the stanchions did not obstruct the light. There is this fact about the starboard light which differentiates it from the port light, and does have some tendency to establish that the starboard light might have been more easily obscured, depending upon the position of the observer, than the port light—and that is that the vessel had a list of 6 degrees to starboard and the stanchions on that list would naturally overhang the starboard light to the extent that the height of the stanchion above the light, say 3 feet, would extend outward when listed at 6 degrees, or say  $4\frac{1}{2}$  or 5 inches, but this overhang of the starboard light would only tend to more clearly expose the port light when looked at from any point above it. The port light was the only light exhibited or intended to be exhibited to the Virginian. The testimony concerning the starboard light is wholly immaterial for, from the moment the Strathalbyn and Virginian were drawing close together, the starboard light never was, or never was intended to be, thrown up to the Virginian.

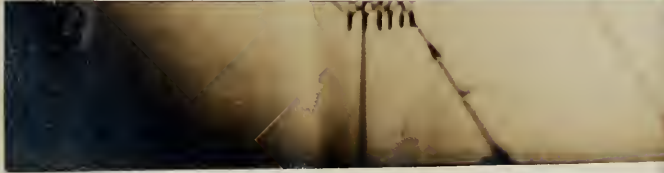
The Strathalbyn's lights were sufficient. They were passed by the Board of Inspectors of Lights in Great Britain. The certificate of inspection is in evidence. The lamps are in evidence. An inspection of them discloses that they are large and fine lamps. They were properly trimmed, fresh, clean oil and new wicks being put in them by Taylor, quartermaster of the Strathalbyn. There is some suggestion in the District Court's opinion that the testimony of Taylor concerning the trimming of the lights might have been corroborated by other witnesses on the Strathalbyn. That could easily have been done. We did not think it necessary. Taylor was the man who did the work. It was our view that the testimony of eye-witnesses that the lights were burning properly at the time of the collision was the best proof there was nothing the matter with the lights. We believed the only interest any court would have in the condition of the lights was their condition just before, and at the time of, the collision.

The testimony as to the partial obscuration of the green light is entirely immaterial in this case, even if the Court should consider it true.

Mr. Purdy, the Strathalbyn's first officer, says that when the Strathalbyn was off around Robinson Point, headed for Pully, for a time the Flyer and

Virginian were from a quarter to a half point on her starboard bow (App.310-311). Hofstetter and Beaumont were looking at the lights, when so positioned, and saw the Strathalbyn's side lights. When the Strathalbyn blew to the Virginian, it was Capt. Beecher, the pilot's, intention that the Virginian should not see his green light (App. 211), and, as he says, he, therefore, threw up his red light to the Virginian, and there is no question but what it was visible to her. He ported a point and a half or two points (App. 327), and if the Virginian's only eye-witness, Capt. Fowler, is correct that the red light was obscured two degrees, then the light was plainly visible to the Virginian as soon as the Strathalbyn ported, notwithstanding this small obscuration. To beat this conclusion, the Virginian devises the theory that the Strathalbyn and Virginian came into collision directly head on; in other words, so that the lines of the keels of the Strathalbyn and Virginian, if extended, would be parallel at the moment of collision. They allege, in their libel, the vessels met head on, or nearly so. To adopt this theory requires the Court to totally disregard the evidence as to the angle of approach and collision of the eye-witnesses both aboard the Virginian and the Strathalbyn, and, in addition, to brand as false the evidence that the course of the Strathalbyn was changed, as given by all the navigating officers on the Strathalbyn. Notice the eye-

witnesses' statements. Mr. Miguel, the lookout on the Virginian, says he didn't see anything of the Strathalbyn until he heard the call of the Strathalbyn's lookout to the men in her forecastle to get out of the forecastle. Miguel says that, when the vessels struck each other, it appeared as though they hit at about right angles. He made this statement during the examination of counsel for the Virginian, and he positively reiterated it several times on cross-examination, and described how he could see the side of the Strathalbyn for half her length (App. 871-880-881). The pilot, chief officer and master of the Strathalbyn, who had no difficulty at all in seeing the Virginian, testify that the angle of approach was from  $2\frac{1}{2}$  points to what appeared to be more like a right angle off the port bow of the Strathalbyn (App. 248-209-317, Ex. A, Beaumont). Note Exhibit A by the Strathalbyn lookout: *App. 317*



Mr. Callan, who had sold coal to the Strathalbyn and was aboard while it was being tested out, came out of the engine room, which is abaft of amidships, and stood on that deck and saw the Virginian coming into the Strathalbyn from off the Strathalbyn's port side.

Is the eye-witness testimony to be wholly discredited and the case be decided as though it had never been given because Capt. Gibbs, Mr. Fowler and



Mr. Erismann testified that they believed, when looking at the damage to the Strathalbyn, and considering her list of 6 degrees to starboard, and considering the fact that the stems of the Strathalbyn and Virginian crossed in the collision, that it must have been a head-on or nearly so collision? They do not pretend to state at what angle the collision occurred if it was not head-on. Mr. Gardner, of San Francisco, expresses his opinion that the collision occurred directly head-on, basing his conclusion on the above facts.

These experts simply submit their deductions without any detail of reasoning or recitation of facts, with the exception that the Strathalbyn had a list of 6 degrees to starboard and the stems of the two vessels crossed each other, carrying away the upper part of the stem of the Strathalbyn above the 29-foot mark to starboard and bending the stem of the Strathalbyn below the 29-foot mark to port. As experts opposed to the experts introduced by the Virginian, the Strathalbyn took testimony of Mr. Jack in New York, employed by the Strathalbyn's owners to repair her, and the testimony of Mr. Dickie in San Francisco, who had the plans of the Virginian, the plans of the Strathalbyn, and photographs from which to make his study. It appears from the testimony of Mr. Jack and the testimony of Mr. Dickie, that the stem of the Virginian, in passing through the Strathalbyn, bit into the beams

of the Strathalbyn and blazed her way through the Strathalbyn by niching on each beam the point where her stem came in contact with it. The line of the Virginian's stem from the stem of the Strathalbyn to the point of its exit is therefore distinctly marked and so distinctively marked that there is no doubt about the line pursued by the stem. This line shows that the Virginian entered the Strathalbyn at an angle of three points, or, as given by Mr. Dickie, an angle of 33 degrees and 49 minutes (App. 756; Ex. Dickie 329 E). In the latter part of the course of the Virginian's stem there is a curve in the line to the left as the Virginian was passing out of the Strathalbyn. The Strathalbyn's starboard list was increased by the collision and she rolled back before the blow was over, thereby causing a curved line to the left to be shown in the course of the Virginian. The Virginian suggests another way: That the Virginian's stem was deflected to port. The line of the indentation and scars caused by the Virginian's stem do not show this. The angle of cutting is established before the deflection commences, as shown by the curve on Ex. Dickie 329 E.

The period that the two vessels were together was so short that it is almost impossible to conceive that either vessel was materially deflected

from its course, especially during the first part of their contact, which could not have been over a few seconds. The master of the *Virginian* describes the vessels as being together about the length of time it takes to snap your fingers (App. 837-857), and all agree they were together but a very short time. The yielding of the material of both the *Virginian* and the *Strathalbyn* lessened the tendency to deflect, but the natural law of inertia and the tendency of heavy bodies to follow the direction of their movement, makes it impossible to conceive that there could have been any perceptible fending off of one vessel from the other until after the cut had been made in the *Strathalbyn*. The *Virginian* was 492 feet long, 58 feet 3 inches beam and 31 feet 9 inches depth, with a net tonnage of 5,077 and a gross tonnage of 9,904. The *Virginian* was drawing 17 feet forward and 20 feet aft. The *Virginian* had an overhang of about 12 inches and the *Strathalbyn* a small overhang of about 4 inches above the point of collision. The *Strathalbyn* was a vessel 377 feet long, 52-foot beam, drawing 22 ft. 6 in. forward and 25 ft. aft (App. 771), and loaded with over three million feet of timber, weighing substantially three pounds to the foot, with all her coals, stores, water and other matters aboard preparatory to a long voyage. The distance from the stem of the *Strathalbyn* to the after end of the cut is about 30 feet, and the beam of the *Strathalbyn* at the end

of the cut is 38 ft. 10 in., which would require a deflection, if the *Virginian* struck the *Strathalbyn* directly head-on, of one-half that distance, or 19 ft. 5 in., in a distance of 30 ft., and in a period that can be measured only by seconds. To deflect the *Virginian* to that extent in that length of time would require the movement of a wall of water one-half the width of the deflection, viz.,  $9\frac{1}{2}$  ft. wide, from her stem to her stern, and for a depth of 17 ft. forward to 20 ft. aft, as well as the movement of her dead weight; or if the *Virginian* was not deflected, then the blow would have turned the head of the *Strathalbyn* 19 ft. 5 in. to port with all her weight and the weight of water along her length and for her depth. The *Strathalbyn* would deflect to port, for the lower part of the stem of the *Strathalbyn* was on the starboard side of the *Virginian*, which was wedging it over to port except as the upper part of the *Virginian* was driving the *Strathalbyn's* stem to starboard as it was cutting through, and clinging to, her beams and plating in that direction. If both vessels deflected, a corresponding weight would have to be moved sideways by the blow. The *Strathalbyn* was swinging to starboard when the blow came, and, as a matter of fact, the blow was not sufficient to stop that swing; but the length of time that the *Virginian* was cutting through the *Strathalbyn* was so short that the *Strathalbyn's* swing to starboard had no perceptible effect on the

direction of the cut (see testimony Jack and Dickie.) When testimony is inherently improbable, it is impossible to understand how credence can be given it in the face of direct and uncontradicted testimony of eye-witnesses, to a contrary fact. We submit, however, without resorting to the testimony of eye-witnesses, that the study made of the subject by Mr. Dickie with the information before him, and the study made of the subject by Mr. Jack with his intimate knowledge and daily contact with the repairs, being much more thorough, is entitled to greater weight, especially as their conclusion is easily verified by a study of the data introduced in evidence. It is the only expert testimony in the case which deals with the evidence left by the cuts of the Virginian's stem on her course through the Strathalbyn. This evidence proves conclusively that the angle of contact of the Strathalbyn and Virginian was far greater than that attributed to it after the cursory examination of the two vessels given by the other experts in the case. We insert a photo of part of Ex. 5-5, the dark line on which indicates the course of the Virginian through the Strathalbyn. It enters at the stem at the point marked EN and leaves at the point marked L. (See testimony of Jack in explanation, App. 414). The photographs of the Strathalbyn's damaged bow show the angle of the cut very plainly.



It being determined that the angle of contact was substantially three points off the Strathalbyn's bow, and it being uncontroverted that the Strathalbyn ported her helm on her first whistle to the Virginian (for the officers on the Strathalbyn know what they did in that regard, and so testify), then there is no excuse for the Virginian failing to see the port light of the Strathalbyn. The lower court seemed to think there was too much attention being paid by the officers on the Strathalbyn to her lights just

prior to the collision. The lower court, however, does not question that the witnesses on the *Flyer*, the passengers, saw the *Strathalbyn's* port light prior to and at the time the *Strathalbyn* was passing the *Flyer*. The lower court does not question that the *Virginian's* navigating officers and lookout saw it immediately after the collision. The port light as a burning light is established, then, when the *Strathalbyn* and *Flyer* were approaching and opposite each other and, therefore, prior to and at the time the *Strathalbyn* whistled to the *Virginian*. If her port light was then thrown up to the *Virginian*, it makes no difference whether it was out or dim before the time the *Flyer* passed the *Strathalbyn*, if the court should so conclude, or whether much or little attention was paid to it at or prior to such time, for it was displayed during the time that the *Strathalbyn* was whistling to the *Virginian*. The *Strathalbyn's* course was northwest half north magnetic and the *Virginian's* course is alleged to be southeast quarter south between Robinson and Pully. The *Virginian* and the *Strathalbyn*, under these circumstances, were sailing along courses only diverging a quarter of a point, or between two and three-quarters and three degrees. If the *Strathalbyn's* lights were obstructed to the extent of two degrees, as testified to by Capt. Fowler, it would only require the *Strathal-*

byn's course to be changed one degree to northward to exhibit her red light unobstructed, for the Virginian was a little off the Strathalbyn's port bow when within whistling distance. But the Strathalbyn, on her first whistle to the Virginian, ported over a point and thereafter swung over more than another point to starboard, which brought her head well to the eastward of Pully Point, as testified to by Capt. Beecher. Commence at a point, say, half-way between Pully and Robinson Points and set a course of north by west half west or north by west. This corresponds with Capt. Beecher's range taken while the Strathalby was swinging. Now, as the Strathalbyn alleges that the Virginian was traveling fast as she was approaching the Strathalbyn, while the Strathalbyn had barely steerage way, the change of a point in the course of the Virginian to port would cut out her red light and expose the green and would bring the vessels together on an angle of substantially three points, which is the angle that they met upon. Under these circumstances, there can be no question that the Strathalbyn's red light was plainly visible to the Virginian long before the collision occurred and when the vessels were in the neighborhood of from a half to three-quarters of a mile apart. This being so, it is not necessary to find any reason why the Virginian should navigate as she did. Her lookout testifies he did not see the lights. The fault, then, is

an insufficient lookout. The pilot may have taken the Strathalbyn's red light for the red light on Pully Point, or, if he saw the Pully Point red light, as he testified he did, and saw the Strathalbyn's red light, then he may just have assumed that it was a small tug coming along with a tow, and paid no attention to it until too late. The Strathalbyn, being loaded deep and her side light being set low, might give that impression. But whatever the explanation, it, of course, lies solely in the mouth of the officers of the *Virginian* and is undiscoverable from the testimony. It is impossible to believe that not one person on the *Virginian* saw the masthead or side lights early enough to avoid the collision, particularly when the Strathalbyn was constantly whistling. But in the testimony there are hints that the lookout was not attentive to his duties, or if he was, that he has not correctly testified. The lookout on the *Virginian* testifies positively he does not remember seeing the *Indianapolis* (App. 874), yet the *Indianapolis* passed the *Virginian* between the time that the *Virginian* rounded Pully Point and met the Strathalbyn. He is asked: "Up to that time, did you see any light from any ship from which this whistle could proceed?" and answered: "I could see—I saw a red light and reported it." He then says it was Robinson Point light, which later brings out this question from Mr. Hughes: "But I am ask-

ing you whether you saw any ship's light at the time or after hearing either of these two whistles? A. No, sir—I didn't see any *other* ship's light." (App. 869-870). No explanation is made in his testimony as to what other ship he refers to, and there could have been none other except the Strathalbyn, since he does not remember seeing the Indianapolis. Pilot Duffy speaks of being on and off the bridge (App. 1180). Duffy is quite uncertain in several particulars of importance.

(App. 1160): "What did you do when you heard this second whistle? The whistle I am talking about now is the first whistle to you?"

A. I could not see anything. I ordered full speed astern.

Q. How was your vessel going when you ordered full speed astern?

A. Full speed ahead.

Q. Did you stop her at any time between full speed astern and full speed ahead? A. No.

Q. Gave no signal to stop her? A. Oh, yes; I stopped her.

Q. When did you stop her? A. When I heard that whistle.

Q. Which whistle? A. The second whistle, that I supposed was for me.

Q. You say the second whistle? A. I mean when he whistled for the Flyer.



Q. That is the first whistle? That is, the first whistle to you?

A. I supposed it was for me."

(App. 1177): "Q. When did you ring to stop or back her the first time? A. The first whistle *after* she whistled to the Flyer.

Q. Then you stopped her? A. Stopped her."

He was asked which whistle caused him to stop.

A. "The first whistle was to the Flyer and the second to me.

Q. Then you stopped? A. Yes, sir."

(App. 1178): He testifies he rang full speed astern when heard third whistle from Strathalbyn, which he thought was the second to him, and that he judges the interval between them was less than a minute. If we read this testimony correctly, he first testifies he stopped when the Strathalbyn first blew to the Flyer and he could not see her, and later testifies he stopped when the Strathalbyn blew her second whistle, which was the first for the Virginian.

(App. 1183): Duffy refers to the time Capt. Green came on the bridge.

Q. (Capt. Green) "Came up after you stopped?

A. When the telegraph was rung to stop, Capt. Green ran up on the bridge.

Q. How long had he been on the bridge before the collision?

- A. Well, it would be, I should think, half a minute, between half a minute and a minute.
- Q. You think that is about right, do you? A. Yes, sir.
- Q. You think he came up about a half a minute or a minute before the collision? A. Yes; he came up just when the telegraph stopped."

Duffy is questioned about the time his vessel is reversed.

(App. 1162): "Q. After giving the signal full speed astern, did you hear any other whistles from ahead?

- A. I heard a danger signal.
- Q. When did you hear the danger signal with reference to the time you reversed both of your engines? A. It must be a minute or over.
- Q. Did you answer this danger signal? A. The Captain answered that, or ordered it answered.
- Q. State what happened after you heard the danger signal and answered it with three blasts?
- A. The ships came together. Well, I guess it did not seem half a minute. It was not very long."

From the above (App. 1183), it is plain Duffy fixes the time of Green's coming on the bridge by the *stop* signal (and this corresponds with Green's testimony), and says Green was on the bridge less than a minute before the collision. Then the stop signal must have been given less than a minute be-

fore the collision. Yet he also fixes the time of the collision (at p. 1162), saying he stopped about a minute before reversing (the interval between the Strathalbyn's whistles), reversed a minute or over before the danger signal and continued ahead half a minute after the danger signals, making two minutes and a half or over that Green was on the bridge before the collision.

He is interrogated about the position of the *Flyer* in relation to its position to the *Virginian* approaching and passing Pully Point.

(App. 1184): "Q. And did you change your course when you got to Pully?

A. We changed our course just before we got to Pully. The Point looked close and I pulled her out a little.

Q. The Point looked close? A. Yes. *The Flyer was a little to the front.*

Q. Then you pulled her out to the westward?  
A. Yes sir."

(App. 1185): Later he was asked:

"Q. Now where was the *Flyer* when you changed your course between Alki to Pully towards the west?

A. She was, oh, a couple or three—well, just astern of us a little to the port side."

(App. 1189). Questions are propounded to him with a view to ascertaining if the *Virginian* was

ahead of the Strathalbyn sufficient to see the Strathalbyn's side and masthead lights after the collision.

(App. 1189): "Q. How much aft of her" (Strathalbyn's) "beam would you be, following the Strathalbyn from the point of the collision over to Robinson's Point?"

A. I do not know because sometime we would be *forward of the beam* and sometimes aft of of the beam."

(App. 1190): "Q. Now when you drew up beyond her beam as the Strathalbyn was going from Pully Point to Robinson's Point, did you see the side light at any time then?"

A. I do not know as I ever was forward or aft of her beam.

Q. I thought you said forward.

A. I said I did not know whether I was forward or aft of the beam at any time."

These instances of inharmonious testimony from the one man who should know casts suspicion on the accuracy of any part of his testimony, particularly that concerning the nature and character of the Strathalbyn's lights, and the time before the collision that his engines were stopped and reversed.

While referring to the Virginian's fault in failing to see the Strathalbyn's lights, we will refer to the following cases in the Supreme Court of the United States and the federal courts, which

deal with collisions brought about through non-observance of lights:

(1) *The Propeller Genesee Chief vs. Fitzhugh, et al.*, 12 How. 443; 13 Law. Ed. 1058. The steamer saw a schooner's light; lost sight of it again; could have seen it within a half a mile. "He knew that the vessel was ahead and so near, nothing could excuse the rashness of continuing the steamboat at full speed if he supposed the schooner was meeting him and not running on the same course." The *Genesee Chief* was held at fault for having an improper lookout.

(2) *The New York & Baltimore Trans. Co. vs. The Philadelphia & Savannah Steam Nav. Co.*, 22 How. 461; 16 Law. Ed. 397. The propeller's lights were seen for some three miles and continued in sight; propeller neared the steamer, and suddenly shifted her course; the steamer was visible but not seen. "Beyond question, the law is well settled that steamers approaching each other from opposite directions are *respectively* bound to port their helms and pass each other on the larboard side. That movement of the propeller" (starboarding her helm) "was a direct violation of the rules of navigation and was entirely without any excuse."

(3) *The Union Steamship Co. of Philadelphia*



*vs. The New York & Virginia Steamship Co.*, 24 How. 307; 16 Law. Ed. 699. He knew that another steamer was approaching, although he denies that he had seen her lights." \* \* \* "But the great fault committed on the occasion was that of putting the helm to starboard instead of keeping the course or *porting* it when it became known that the other steamer was approaching."

(4) *Tourette & Butler vs. Burton*, 1 Wall. 43; 17 Law. Ed. 609. "Witnesses for the respondents or some of them testify that they did not see the light until just before the collision occurred, and the inference is attempted to be drawn from that fact that the light was in an improper place, but the weight of the evidence satisfies the court that it could easily have been seen if there had been proper vigilance on the part of those in charge of respondent's vessel."

(5) *The Wm. T. Frazier vs. The Wenona*, 19 Wall. 41; 22 Law. Ed. 52. "Both vessels also showed signal lights, but it is insisted by the respondent that the signal lights of the schooner were not properly located upon the vessel. It clearly appears that the lights were burning brightly, and that they were seen by the propeller in ample season to have enabled her to have adopted any proper precaution to have avoided a collision."

(6) *Fink vs. The Steamboat Fairbanks*, 9 Wall. 402; 19 Law. Ed. 708. "Some conflict exists in the testimony as to the point whether the brig had the required lights and whether she kept her course as alleged in the libel. It is satisfactorily proved that the brig had the required lights and that her outlooks were properly stationed on the forward part of the vessel."

(7) *The Schooner Sarah Watson vs. The Steamer Seagull*, 23 Wall. 165; 23 Law. Ed. 90. "Both vessels had proper signal lights and both had lookouts, but the better opinion is that the lookout on the steamer was not as vigilant as he should have been in the performance of his duty. Strong support to this view is derived from the fact that the lights of the steamer were seen by the lookout of the schooner when the vessels were three or four miles apart, but those in charge of the steamer saw nothing of the schooner until the two vessels were within a half a mile of each other, and then saw at first only the sails of the schooner and those indistinctly."

(8) *The Bluejacket vs. The Tacoma Mill Co.*, 144 U. S. 371; 36 Law. Ed. 469. Both vessels allege but did not prove defective lights. The sailing ship was held at fault because, after the tug began to port, the sailing ship changed her course to starboard.

(9) *The Oregon*, 158 U. S. 186; 39 Law. Ed. 943. The vessel was at anchor in the Columbia River, and displayed her anchor lights.

“The weather was calm and the sky somewhat cloudy, but the night was such a night as is most favorable to the discovery of lights.” “The light which the pilot saw both above, at and below Bogle’s Point and which he mistook for the Coffin Rock light was, in fact, the light of the Clan McKenzie, and the Clan McKenzie was not discovered until the Oregon was within 300 feet of her,” the court remarking: “In short, there can be no doubt whatever that this collision was attributable to the inefficiency of the pilot and lookout of the Oregon.”

(10) *The New York*, 175 U. S. 187; 44 Law. Ed. 126. Here it was charged that the lights were not visible, but the testimony did not sustain the charge in the court’s conclusion. The court, however, says:

“If the New York heard the signals” (of the Conemaugh), “it was her duty to answer them. However, the white light in connection with the whistles could only have been the masthead light of a steam vessel, and, as there is no evidence that there was any other vessel coming up the river, the signal could only have been intended for the New York.

(11) *The Golden Dove*, 13 Fed. Rep. 674. It was charged that the brig did not have proper lights, but the steamer was held wholly at fault because she did not have a sufficient lookout and because her officers were careless.

(12) *Farwell vs. The Steam Boat John H. Starin*, 2 Fed. Rep. 100. The steamer was held at fault because her lookout was negligent and did not see the schooner's red light until it was too late to avoid the collision.

(13) *The Pegasus*, 19 Fed. 46. Here the Pegasus failed to see the lights on the tug, and it was held that her lookout was in fault. The opinion says:

“Precisely where this negligence should be located is not important; it suffices that they failed to see them when they were plainly visible to those in charge of the steamer, if they had used due diligence.”

(14) *The Avon*, 22 Fed. 905, was a case where the vessel displayed two anchor lights. The Avon's crew did not make out the light in time to avoid the collision. The Avon was held solely at fault.

(15) *The Thingvalla*, 48 Fed. 764, where it was claimed that the Thingvalla's lights did not show, but this claim was not sustained.

(16) *The Alice B. Phillips*, 81 Fed. 415, where the court says:

“The distinction urged upon our attention in appellant’s brief between an inquiry as to whether the schooner’s *port light* was burning at all and an inquiry as to whether it was so burning as to be properly visible, is one which does not appear to be material under the evidence. The testimony of those on board the schooner is harmonious, positive and creditable, and is distinctly to the effect not only that the light in question was actually burning, but also that it was bright; and we cannot agree that because it has been testified that some—perhaps all—of these witnesses *especially looked* at the light to observe its condition when the steamer was perceived to be approaching we should regard their statements with suspicion. On the contrary, we think this was a perfectly natural thing for them to do under the circumstances, and that the fact that they did do it makes their testimony all the more certain and reliable.”

(17) *The Robert Graham Dunn*, 107 Fed. 994, exhibits another instance of the assertion that the schooner’s lights were defective, but the court found:

“That she carried proper lights and that they were not obscured from the observation of the



steamship and that the collision was wholly attributable to the conduct of the steamship."

(18) *The John H. Starin*, 113 Fed. 419. Here the *Starin* struck the schooner *Allen Gerney*. It was claimed that the schooner had a lantern in her fore-rigging, she being at anchor, but that it was not burning at the time of the collision. The *Starin's* witnesses swear no lights were visible, and the schooner's witnesses swear the light was burning and visible prior to and at the time of the collision. *Outsiders testify* that they saw the light, but it is not clear whether they saw the light within thirty minutes of the collision. The steamer was held.

(19) *The Richmond*, 114 Fed. 208, has the following in the opinion: "The only fault alleged against the schooner seriously contended for is, that at the time of the collision, its lights were not up and set and properly burning." After referring to the testimony of the officers on the schooner that twice within forty minutes before the vessels came together, he saw the lights in place and properly burning, and after considering the testimony of the man who trimmed the lights, the court remarks: "The positive testimony of those on the schooner in a position to see the lights, and know their condition, will not be lightly rejected because other persons, whose duty it was to have

seen them, either failed to observe, or happened not to see them. Negative evidence of this character cannot be accepted to out-weigh positive evidence. The failure to observe a light cannot be said to disprove its existence." \* \* \* "The court should be slow to hold that the officers and crew of the vessel were navigating the same without lights, as, by so doing, they were imperiling not only the ship and the cargo, but their own lives." \* \* \* "Had this lookout been competent or in the proper discharge of his duty, the schooner could easily have been seen and reported with or without lights, according to his own statement, in time to have avoided the collision." None of the witnesses except the lookout on the *Virginian* made out the *Strathalbyn's* loom, and the lookout only saw her loom 10 seconds before the collision.

(20) *Helen G. Moseley*, 117 Fed. 760. The red light of the schooner was not seen until within less than a minute of the collision, according to the testimony of the men on the bridge, and the lookout on the steamer. They testify that when it did appear, it was small and dim and about a ship's length off. The opinion reads:

"Hence, four suitable men in the positions stated claim to have been looking forward and around for lights, yet each testifies that he did not see this light until the moment named. But the light existed, it

was uncovered and was sufficiently bright to have been seen for ten minutes before the collision." \* \* \* "Therefore, the question is, whether a supposition that there is not sufficient support from the evidence should be adopted because it would relieve persons who should have seen a light from their failure thereof. It is not the province of the court to find theories but facts. There is no doubt that the steamer was employing a suitable lookout, and that the men on watch were using a fair degree of care, but had they exercised requisite care, no reason for their failure to discover the existing red light on the schooner is shown."

(21) *The Helen G. Moseley*, 128 Fed. 402. The steamer charges that the schooner's red light was a small, dim red light, and that they saw the loom of the sails on the starboard bow as soon as the lights. All of the men on the steamer were experienced. The court says in its opinion on appeal:

"It is difficult to understand how such a crew of officers and men, in the beginning of their watch, could have failed to see the red light earlier if it had been visible." \* \* \* "Nevertheless, individual aberrations of sight and attention do occur, even among the ordinarily careful, and, however enormous the odds may be against such a simultaneous occurrence among four persons, the combination is possible. Therefore, under well-settled prin-

ciples, unless there can be shown some cause, due to the schooner, why her red light was not shown to the steamer until in the very jaws of the collision, the conclusion must be that the steamer was in fault."

(22) *The Queen Elizabeth*, 122 Fed. 406, from which it appears, by the court's opinion:

"We have no doubt as to the negligence of the *Birdsall*: If her crew had been competent, alert and watchful they certainly would have seen the ship's red light before it was 'right abreast' on the starboard beam." \* \* \* "The evidence that the ship's lights were burning brightly is overwhelming, and if the lookout had been attentive, he could have seen the red light twenty minutes prior to the collision and when the ship was miles distant. His failure to do this on a clear night was unquestionably a fault."

(23) *The Three Brothers; The Stamford*, 136 Fed. 479. "The Three Brothers insist that the lights of the *Stamford* were being put up at the time of, or just before, the collision, but it satisfactorily appears that they were duly set and were brightly burning up to, and subsequent to, the collision."

(24) *Brigham vs. The Luckenback*, 140 Fed. 322, where it appears that "The respondents

accuse the schooner of fault in that she did not have proper side lights set and properly burning at the time of the tug's approach. Upon this point there is the distinct, affirmative evidence of those upon the deck of the schooner that the lights were lighted and burning at the time of the collision." One witness says: "He looked at the lights three times as the steamer was approaching. The lights were burning brightly;" and the question was asked, "Are the lights burning?" and answered, "Yes, sir." Several cases are quoted from in the opinion. The court concludes: "The failure on the part of the tug to see those lights was due to the want of a vigilant and efficient lookout."

(25) *The Martha E. Wallace*, 148 Fed. 94. The vessels were approaching each other so that the Wallace was showing her port side to the Richie. The Wallace was sought to be held liable, without success, because her port light was not properly burning. The court: "It seems to be a case justly falling within the decision stated by Dr. Lushington in the 'Vivid.' 'The parties may swear that they did not see a light, but that never can be received in evidence in opposition to those who say that they showed a light, because both statements may be true. A light may have been exhibited and those on board the steamer may not have seen it'."



(26) *The John Bossert*, 148 Fed. 903. The Witley recovered. "That the light on the Witley was seen from the Bossert just before the collision is admitted."

(27) *Bennett vs. The United States*, 162 Fed. 64. "The government accuses the brig at fault in failing to have lights properly set and burning at the time of the collision. The government's contention that there were no lights is based upon the testimony that when Admiral Casey came on board the brig, he saw no lights, and that when Bennett rode around the brig, he saw no lights, and that, after the collision, lanterns were found aboard with the lights out. Against this, we have the distinct, affirmative testimony that the lights were properly lighted and set at twelve o'clock, *and there is a presumption that such condition existed at the time of the collision*, there being no testimony to the contrary." "The court must come to the conclusion that the testimony to which I have referred as to the lights being out is not persuasive as against the affirmative testimony that there were lights."

(28) *The Dorchester; the Fannie S. Groverman*, 167 Fed. 124. "There are only two matters found by the District Judge which are controverted on this appeal. The first is, whether or not the red light which it is proved the sail vessel had in her

port rigging was bright enough to be seen at a sufficient distance to give notice to the steamship in time to avoid her, and the other is, as to what distance the sail vessel or her red light was actually seen by those navigating the steamship. On both these matters of fact, the learned Judge found for the schooner. Although there was a conflict of testimony, there was ample proof to sustain the libellant's contention that the schooner's red light was visible if the lookout of the steamship had performed his duty at a distance sufficient to have enabled the steamship to have avoided the schooner if she had ported instead of starboarding."

(29) *The Nanuet*, 176 Fed. 123. "There was no dispute about the schooner showing her *green* light, but it was strongly urged that her *red* light was not burning. *It does not seem that this would have made any difference, as the green light was always in view of the tug*, but if the red light had any bearing whatever upon the collision, there could be no reasonable doubt that it was properly displayed. The testimony on the schooner makes it clear that it, as well as the green, was duly lighted and shown. *This was, as to its being displayed, confirmed by an outside witness from the passing tug*, who saw the light. The lookout on the part of the tug was deficient." \* \* \* "The tug's account of the lights and navigation is incredible.

Those on her apparently did not see the schooner when they should."

(30) *The Colorado; Steam Lighter* No. 24, 173 Fed. 649. It is charged that the lights on the lighter were obstructed by the deck load.

"I think it is probable that the lights were visible to careful observers over the deck load, and the important question in the case is whether the navigation of the vessels was in conformity with the rules and ordinary prudence."

(31) *The Sequin*, 173 Fed. 723. The barge was charged with not having lights. It was found she displayed all the lights required by the statute.

(32) *The Europe*, 175 Fed. 596. "But special complaint is made that she" (the *Europe*) "was anchored without proper riding lights." Judge Wolverton makes a close diagnosis of the evidence and holds the light was sufficient, notwithstanding the testimony that it might have been obstructed. It appears that the light was mistaken for a light on shore.

(33) *The Manhattan*, 181 Fed. 229. "I feel compelled to find that the Albany's lights were burning at and before the collision and should have been seen by competent, attentive observers."

(34) *The Henry O. Barrett*, 161 Fed. 481-482.

“The dredge displayed another light forward, but the District Court found, and we concur in that view, that such light misled no one and did not contribute to the collision.” \* \* \* “These witnesses are interested, swearing to exculpate themselves. I have yet to meet with an instance of collision where witnesses from the vessel in fault did not testify to the faithful discharge of their duties and the faithlessness of the other vessel.”

(35) *The John Englis*, 176 Fed. 723, where the lights were not seen until within 200 feet apart, but they might have been seen a mile away.

(36) *Oceanic Steamship Co. vs. Simpson Lbr. Co.*, 186 Fed. 764. The lights were seen burning 12 minutes before the collision. Held that they were properly placed and burning.

(37) *The Dekatur H. Miller*, 62 Fed. 92. The witnesses for the Miller testified they saw no lights on the Hitch. “All the witnesses on the Miller—the mate, quartermaster and lookout—swear that, just previous to the collision, these lights on the Hitch were not in fact burning and that they never saw any red or green lights on her at all. This may be so. It is possible that the lights, or at least the green light, may have gone out after the mate had examined it. If he had seen to it that the lights were bright, burning and in order when put up at

six o'clock and were in order likewise at half past six and were in like good order at seven, within five minutes of the collision, surely it would be holding them to too strict an accountability if we say they were in fault for not knowing that they were burning within those few minutes.

In addition to the above, failure of lookouts to see lights have condemned their vessels in the following cases:

*River & Harbor Improvement Co. vs. Philadelphia Ry. Co.*, 180 Fed. 954.

*The Chas. C. Lester*, 174 Fed. 289.

*The Hortensino*, 174 Fed. 272.

*The Larringa*, 172 Fed. 264.

*The Aries*, 165 Fed. 514.

*The Dorchester*, 163 Fed. 779.

*The H. B. Rawson*, 152 Fed. 1001. In this case it is held that the tug should be exonerated, although she might have stopped sooner, on the ground that the fault of the steamer was sufficient to account for the collision, and her contributory fault was not clear. There being but one light on each scow, held unimportant in view of the steamer's fault and the fact that the tug carried proper towing lights.



Capt. Penfield testifies that the Strathalbyn's stern light was out when the Indianapolis overtook the Strathalbyn at Robinson Point. Taylor, the Strathalbyn's quartermaster, testifies he left the top of the stern light up in order to give the lamp more ventilation, and that it blew out on a whirl of wind around the Point, but that he lit the same before the collision. Capt. Beecher, on his way back to Tacoma after the collision, called attention to the fact that the green light was growing dim and had the third mate take it in to be touched up. Much has been said concerning these facts, over the Strathalbyn's objection, on the ground that they are immaterial, for the reason that a stern light is not supposed to be seen when vessels are approaching each other and for the reason that the green light was burning brightly at the time of the collision, and it makes no difference how it was burning after the collision. Capt. Penfield testified that the green light was somewhat obstructed, and this testimony was objected to, as was all the testimony concerning the green light, on the ground it was immaterial, for the reason that, during the time the vessels were approaching each other, after it became necessary to navigate them with respect to one another, the green light was never intended to be, and could not be seen by the Virginian on account of the heading of the Strathalbyn. Admitting, for the sake of argument, that the green light was ob-

scured, it did not and could not have misled the Virginian. It would be a violation of the rules to obscure the green light, but such violation would be of no consequence unless it was a factor in bringing about the collision.

*The Steamship City of Washington vs. Peter R. Baillie*, 2 Otto 31; 23 Law Ed. 600-603. The failure to have a masthead light was considered not to have contributed to the collision.

We have incidentally called attention to differences in the testimony of Eoff, Rich and Cawley, the launch-boys, and Leach and Macquarrie as to the visibility of the Strathalbyn's red and green lights simultaneously beyond Dash Point, on her return to Tacoma. Capt. Burns, of the Flyer, states that he did not believe the red and green lights of the Strathalbyn could be seen from the Flyer as these vessels were approaching. He bases this statement on the fact that he did not see what he terms the range and masthead light of the Strathalbyn in line, and he judged, from the position of the lights he terms the range and masthead light, the Strathalbyn was heading to the eastward of his course. Capt. Milnor and Capt. Burns both testify they saw a masthead and range light on the Strathalbyn. The range light never was set out. They saw some other light which they mistook for it. Burns' testimony that the Strath-

albyn was heading so both her side lights could not be seen from the Flyer is a conclusion drawn from an incorrect premise. It, therefore, must give way to positive testimony of credible witnesses. There are other differences in the Strathalbyn's witnesses' testimony. Do not these differences stamp the testimony of each witness with honesty? The testimony is their testimony, unwarped, undirected and uninfluenced by the testimony of any other witness or by a desire to harmonize such testimony or by a desire to give testimony in accordance with any preconceived plan of attack or defense of the owners of the Strathalbyn or any of their representatives. A great many of the Strathalbyn's witnesses were asked if they had not talked with Strathalbyn's counsel. The divergencies in their stories show that their talks with Strathalbyn's counsel did not have the effect of eliminating inconsistencies in the testimony by moving the witness to tell a story other than he conceived it. This court knows enough of human nature, of the individual differences in the powers of observation and recollection and the different characteristics of expression among witnesses, to willingly accept the rule of logic and experience that seldom two men recount an occurrence exactly alike and to believe in the honesty of the witnesses and their testimony more readily and willingly when their stories vary than if their stories had

no differences concerning the incidental facts of time, location of making observations or matters of that nature.

Considering, now, the second branch of our inquiry, and that is: Was the Strathalbyn's navigation negligent when the Strathalbyn and Virginian were approaching?

*The New York and Liverpool United States Mail Steamship Co. vs. Otis P. Rumball*, 21 How. 372, 16 Law. Ed. 144. On page 148, the Supreme Court lays down a rule for weighing evidence with respect to the weight to be given testimony of the officers and crew on each vessel. This quotation appears on page 148, at the top of the first column:

"One remark is applicable to all the witnesses introduced by the respondents" (the steamship) "and that is, they had not the same means of knowing respecting the matter in dispute as the witnesses for the libellants possessed, who had charge of the brig and governed her course; and in weighing the evidence, and determining its force and effect, that important consideration cannot be overlooked. It must be admitted that the witnesses on the part of the libellant" (the brig) "speak with actual knowledge, and unless they have wilfully stated what they know to be false, their statements must be correct. They were on the deck of the

vessel, interested, so far as their personal safety was concerned, to observe everything that transpired as the steamer approached, and they cannot well be mistaken in respect to the matter under consideration." This collision was not caused by inevitable circumstances. It was brought about through the carelessness of either one or both of the steamers. To determine negligence requires an investigation of the conduct of parties before the vessels get close enough together to require perfect judgment *in extremis*. The Flyer's speed was 14 1-2 knots; the Virginian's was 11 knots. In a minute, the Flyer was making 1470 feet; in a minute, the Virginian was making 1115 feet; or, in a minute, the Flyer was going 355 feet farther than the Virginian at the regular maintained speed, before there was any slowing or diminution of speed in consequence of the Virginian and Strathalbyn stopping and reversing when drawing closer together. It would take the Flyer 8 minutes to run a little less than half the distance between Pully and Robinson Points. When the Flyer was half way between Robinson and Pully Points, the Virginian would be 3,000 feet behind if they both left Pully at the same time. The Strathalbyn first blew to the Virginian when she was from a quarter to a half mile (App. 205) away from the Flyer, or, say, 1,000 to 2,000 feet forward of her, so that the distance between the Virginian



and Strathalbyn, when the first whistle was blown, was approximately, according to these figures, 4,000 or 5,000 feet, or two-thirds of a mile or more, provided the Flyer pulled ahead of the Virginian at Pully Point. It appears, however, from the testimony of Capt. Duffy, that the Flyer was hauling up alongside of the Virginian before the Virginian got to Pully Point, and there is some confusion in Pilot Duffy's testimony as to just where the Virginian was passed by the Flyer, but the testimony seems to preponderate that it was off Pully Point. The Strathalbyn was traveling about 6 knots an hour, or 10 minutes a mile. She would be making 608 feet a minute. The combined speed of the Virginian and Strathalbyn is 1723 feet a minute. The Strathalbyn was some 1,200 feet ahead of the Flyer when she blew her first to the Virginian (App. 121). If the vessels were, say, 4,000 feet apart when the Strathalbyn first blew to the Virginian and they maintained their full speed from the time of the Strathalbyn's first whistle up to the collision, they would have met after navigating about two and a third minutes. This time does not check with the time shown by the Strathalbyn's engine room log to have elapsed between the bell to stop the Strathalbyn and the time of the collision. The Strathalbyn's engines were stopped at 7:34 and the collision occurred at 7:38. The time which elapsed was four minutes. The

Strathalbyn's engines were stopped when she blew the second time to the *Virginian* (App. 206, 225). Between the first blast and the second, there was sufficient time elapsed to permit the *Virginian* answering, estimated at about a minute, so that, according to the record of time, there was five minutes elapsed between the first whistle of the *Strathalbyn* to the *Virginian* and the collision, instead of two and a third minutes. This lengthening of time is probably due to the combination of two facts: First, that the *Flyer* passed the *Virginian* probably north of Pully Point, and passed the *Strathalbyn* somewhat nearer Robinson Point than midway between Robinson and Pully Points. The estimate of the distance by the officers on the *Strathalbyn* at the time the first whistle was blown to the *Virginian* is in the neighborhood of a mile (App. 222). The second reason is because the *Strathalbyn* ceased moving as rapidly through the water as 608 feet per minute, and also because the *Virginian* checked her speed during the last minute, by reversing full speed astern. Taking all this into consideration, it is probably safe enough to say that the vessels were a mile apart when the *Strathalbyn* first blew to the *Virginian*. If the vessels were a mile apart and there was no diminution of speed, the combined speed of the two vessels would bring them together in substantially 3 1-2 minutes. The *Virginian's* engine room log

shows that the vessels came into collision at 7:58 and that the engines were stopped at 7:57 and sent full speed astern at 7:58. There was, therefore, a minute during which the *Virginian* was moving without the propulsion power of her propeller, and her speed necessarily would be checking, to some extent, although not very much, according to Pilot Duffy. He says the *Virginian* went three-quarters of a mile after stopping up to the time she went full astern (App. 1178). The *Virginian* was reversing a few seconds before the steamers came into collision, as Capt. Beecher saw the engine turn over and throw water up under her quarter after the three whistles had been blown from the *Virginian* and she was about striking the *Strathalbyn*. The engine room log, where time was actually kept, shows that at least 4 minutes elapsed while these vessels were approaching each other, and the engine room log, taken in connection with the testimony of Capt. Beecher, shows that at least 5 minutes elapsed while the steamers were coming together. It is safe to say that the estimate of three-quarters of a mile to a mile as the distance the vessels were apart when the *Strathalbyn* first commenced to signal to the *Virginian* is not too great. The *Strathalbyn* and *Virginian* were on substantially opposite courses. The *Virginian* was heading southeast a half south magnetic (App. 1157), and the *Strathalbyn* was heading northwest

a half north magnetic (App. 229). The vessels were in the usual track of vessels between Tacoma and Seattle. Whatever variation there was in the position of the vessels was due to the difference in their point of departure, and the point of departure of both the Strathalbyn and Virginian is an estimate. The Strathalbyn estimates she was off Robinson Point a quarter of a mile, and the Virginian estimates she was off Pully Point a half a mile. There was nothing special to fix these distances in the minds of the pilots at the time. The Strathalbyn saw the red and green lights and mast-head and range lights of the Virginian substantially over her stem, but a little on port bow. When taking these courses, or afterwards, the Strathalbyn swung sufficient to place the Virginian a little over her starboard bow at one time, and, as the Flyer was taking substantially the same course, the red and green lights of the Strathalbyn were visible on the Flyer, as she was approaching the Strathalbyn. The estimates of distances that the Strathalbyn and Virginian were apart, of course, are only made by those on the Strathalbyn, because the Virginian claims that it could not see the Strathalbyn. The Strathalbyn's liability must be determined, then, by her own testimony. On the second whistle, according to Capt. Beecher, the Strathalbyn's pilot, the vessels were about half a mile apart. On the third, they were from

1,200 to 1,500 feet apart (App. 227); and, on the danger, they were from 600 to 800 feet apart (App. 228). On the second whistle, when the *Virginian* was thought to be half a mile off, the *Strathalbyn* was stopped. If the *Virginian* was making 1,100 feet a minute, it would take about three minutes to make this half mile. It was, however, three minutes between the time the *Strathalbyn* was stopped until she reversed, and a minute after she reversed until the collision, so that four minutes elapsed between the signal to stop, which was on the *Strathalbyn's* second whistle to the *Virginian* and the collision. From the above, it appears that this estimate of a half a mile cannot be an underestimate of the actual distance. The vessels approached until they were within about 1,500 feet of each other, when the third whistle was blown, at which time the red light of the *Virginian* had disappeared. It did not show up again. When the vessels were within about 800 feet from each other, the *Strathalbyn* blew the danger signals, reversed her engines (App. 228), and the vessels came together in a minute thereafter. It is likely that the distance is about correctly stated, for the *Strathalbyn* was nearly at a standstill during the greater part of the four minutes from the time of her stopping until the collision, and was making a course off to starboard instead of directly ahead. Capt. Beecher and Capt. Sprague both agree that



after Capt. Beecher had given the one blast and directed his course to starboard, he could not change the single whistle to two blasts, notwithstanding the apparent change in the Virginian's course (App. 227, 1386. The Strathalbyn's pilot was required to act with positiveness so as not to baffle any effort on the part of the Virginian to avoid the collision, and was justified in assuming that the Virginian would see his lights until some contrary notice, by whistle or otherwise, from the Virginian, advised him to the contrary.

*The Gary*, 161 Fed. 420, speaks of the need of strict adherence to the rules of navigation. The rules say it shall be the duty of vessels meeting head-to-head or nearly so to each pass to the port side of the other. This is a mutual duty, and casts the burden on one vessel as much as the other. The court says the steamship had no right to assume "that the tug was going to proceed contrary to the rule and pass her starboard to starboard and on the wrong side of the channel." The court then cites cases where the non-observance of the rule has brought about collisions.

*The Steamship Britannia vs. Elezabeth Cleugh*, 153 U. S. 127; 38 Law. Ed. 660-665. It is the duty of a vessel to adopt a course and maintain that

course to prevent baffling the efforts of the other to avoid a collision by departing from the rule.

*The Breakwater*, 155 U. S. 252; 39 Law. Ed. 139-144. Exceptions to a definite rule should be admitted only when imperatively required by special circumstances.

*The Marguerite*, 87 Fed. 953. If the master of the preferred steamer were at liberty to speculate upon the possibility of a steamer failing to do her duty, certainty would give place to doubt and would produce a timidity and feebleness of action on the part of both masters which would bring about more collisions than it would prevent.

*The William Chisholm*, 153 Fed. 703-712. Her double blast would mean to the Chisholm, "I am directing my course to port." If she was in doubt of the intention of the other vessel, she was bound to give an alarm whistle and check, or stop and reverse, if necessary, as required by rule 26; but, if she gave no notice of any embarrassment, the Chisholm was entitled to assume that she had none and proceed accordingly.

*The Devroe Powell*, 165 Fed. 634. The pilot did not know that the tug had no lookout nor that the tug's master was unobservant of the movements of the ferry-boat. All he knew was that

the tug had twice failed to answer his signal and the vessels were approaching on crossing courses. The pilot insisted on his signals. A trifling change of the tug's helm to port would have sent her safely under the stern of the ferry-boat.

It is difficult to understand why the *Virginian* would swing her head to port. Other vessels have done so under inexplicable circumstances.

*The Steamship Columbia vs. James H. Bunting, known as The Columbia*, 10 Wall. 246, 77 U. S. 890. Here the *Columbia* was coming down the river on nearly paralleling, but converging, courses with the propeller *Jersey Blue*, but the *Columbia* swung to port so that she came directly in line with the propeller. Consequently held in fault.

*The Brig Annie Lindsey vs. Daniel Brown, known as The Annie Lindsey*, 14 Otto 185, 26 Law. Ed. 716. Here the two ships were meeting end on, and the brig violated the rule by not porting, but by putting her helm to starboard. She was held at fault.

The signal system of the *Virginian's* starboard engine caught and would not convey signals to the engine. Did her starboard telegraph get out of order on the stopping signal? And, when the engines were signalled to reverse, did only the port engine receive the signal, and in reversing threw the head

of the *Virginian* rapidly across the path of the *Strathalbyn*? It may be that the starboard engine was not stopped at the time the port engine was stopped and it was not stopped until the mate could go down on the deck below and signal to the engineer on the starboard engine through the speaking tube. By the time the *Strathalbyn* had blown her second whistle to the *Virginian*, she was headed in to the beach, and was so headed to clear the *Virginian*, if it was possible. At the time Capt. Beecher blew the *Strathalbyn*'s second whistle, the *Virginian* was swinging so as to close her red light (App. 226), and, at the third whistle, the red light had closed (App. 227), and it was not until after the second whistle that Capt. Beecher had reason to feel that the *Virginian* was not being carefully navigated. He then sounded one more single blast, so as to be sure that the *Virginian* knew his positive intention, expecting that her bad steering would be rectified, the vessels being easily far enough apart to justify this conclusion, but, that surmise being unjustified by the future conduct of the *Virginian*, he blew the danger signal when it became apparent the positions of the vessels involved danger of a collision, at which time the *Virginian* could have co-operated with the *Strathalbyn* by throwing her helm to port and have safely passed to the port side of the *Strathalbyn*. Capt. Beecher had a right to as-

sume that the officers on the *Virginian* would see what was visible, and, while they might not hear his first whistle, if they were attentive they should have heard his second and third.

We now wish to refer to a few authorities which show the action of the *Strathalbyn's* pilot above set out, was without fault.

(1) *The Wm. T. Frazier vs. The Wenona*, 19 Wall. 41; 22 Law. Ed. 52. "In speaking when the passing rules became applicable, the court says that the rules are inapplicable to vessels of every description while they are so distant from each other that measures of precaution have not become necessary to avoid the collision."

(2) *The New York*, 175 U. S. 187; 44 Law. Ed. 126, *supra*: "The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect."

(3) *The Thingvalla*, 48 Fed. 764. In connection with the navigation of the *Thingvalla* after seeing the *Geyser* approaching her head on, and turning to the starboard instead of port, the court says: "Whether or not she" (the *Geyser*) "would



realize that fact" (that is, her cross steering) "and alter her helm accordingly, the navigator of the Thingvalla could not know. An attempt on his own part to abandon the course, which the rules enjoined upon him in the one case and permitted him in the other, might, so far as he knew, tend to produce the very mishap it was intended to avoid. He did what the rules required of him when, seeing the mistaken maneuver of the Geyser, he stopped and reversed."

(4) *The Livingstone*, 113 Fed. 879, was held solely at fault where she could see the Traverse a quarter of a mile away, although he did not see her lights. "But we are unable to concur in the proposition that such fault was instrumental in producing the collision. The District Court found that when the vessels were a quarter of a mile apart and the third whistle of the Traverse was heard on the Livingstone, the vessels were in a position of safety which could be made unsafe only by the starboarding of the Livingstone. Had the latter ported or even held her course there could have been no danger." \* \* \* "He could see the Traverse while her signal notified him as plainly as any lights would have done that she was directing her course to starboard." The Traverse was not held responsible for not backing, because,

at the time the Livingstone changed her course to port, she was *in extremis*.

(5) *The Stanford*, 136 Fed. 479 (*supra*), stopped and backed when her lights were not seen and she was held free from fault.

(6) *Lake Erie Trans. Co. vs. Gilchrist*, 142 Fed. 94. "That every vessel when approaching another so as to involve risk of collision shall slacken her speed, or stop or reverse, if necessary, is plain elementary law. So if one vessel be approaching another which has disregarded her signals or whose course or purpose is uncertain, she should check her speed or stop or reverse as the case seems to demand until her course is ascertained with certainty. \* \* \* *The New York*, 175 U. S. 206, 44 L. Ed. 126; *Marsden on Collisions*, 434, etc." The *Rome* was not bound to anticipate that the *Mack* would not act lawfully and comply with her agreement, and, so long as there was apparent reasonable opportunity for her to swing and clear the *Rome*, the latter might assume that she would do so." \* \* \* The *Rome* was held faultless. "When was the *Rome* chargeable with notice of risk of collision growing out of his disobedience? She realized that there was danger when they came within a thousand feet of each other and promptly ported. How long before that ought she to have regarded the *Mack* as too long in adhering to her

apparent original course? This direction to check, stop or reverse **when two** vessels are upon a course which involves risk of collision manifestly does not apply to a situation which is perfectly safe if no departure is made from settled principles of navigation whether imposed by statute or custom. "It must apply if the circumstances are such that an officer of ordinary skill and care would be bound to come to the conclusion that if the ships continue to approach each other there will be risk of collision."

(7) *The Lowell M. Palmer*, 58 Fed. 701. Here the Palmer persisted in blowing three signal whistles (as did the Strathalbyn) and the court held she was without fault in the following language: "Under these circumstances, the steamer is plainly in fault for not observing the whistles of the Palmer, for not going to the right as was her duty in that situation, and for making over, on the contrary, toward the Brooklyn side of the river. The Palmer seems to me to have done all that was incumbent upon her in the endeavor to avoid collision."

(8) *The Jay Gould*, 19 Fed. 765, 769. "The obligation to slacken speed whenever, by a false maneuver on the part of another vessel, a steamer incurs the danger of collision has been enforced in

numerous cases under circumstances very similar to those in the case under consideration.

(9) *Williamson vs. Barrett*, 13 How. 101, 14 Law. Ed. 68. "While these vessels were not on crossing courses, nevertheless the duty of each was to go to the right."

(10) *Steamship Favorita vs. Union Ferry Co.*, 18 Wall. 598, 21 Law. Ed. 856. "It is said if The Manhasset had advanced instead of stopping she would have cleared the steamship. This may or may not be true, but if true, she is not in fault for this error of judgment. If the Favorita had been where good navigation required her to be, or had she slackened her speed so as to be able to stop as soon as she discovered the Manhasset, the danger would not have existed, nor the accident happened. She is, therefore, in our opinion, chargeable with all the consequences that flow from this collision."

(11) *The Assilia*, 108 Fed. 975, page 980. "Under these circumstances, it does not seem reasonable the highest degree of promptness and certainty of action should be exacted of those navigating the Grathorne. They were confronted by a perplexing situation, brought about by no fault of their own."  
\* \* \* (and on page 981) "and when he could be sure that the Assilia was not going to follow the

channel, but under a hard starboard helm was heading him off, he stopped and reversed."

(12) *The Delaware*, 161 U. S. 459, 40 Law. Ed. 771. "Until the last moment, the tug had a right to assume that she (the Delaware) would comply with the rule."

(13) *The Steamship Nevada vs. Sergeant J. Quick*, 16 Otto. 154, 27 Law. Ed. 149 (particularly at the bottom of page 150 and top of page 151). "Perhaps they might have done something else which would have been better. The event is always a great teacher. \* \* \* But these possibilities are not the criterion by which they are to be judged. The question is, did they do all that reasonable prudence required them to do under the circumstances?"

(14) *The Andrew J. Hutchinson vs. The Steamboat Northfield*, 96 U. S. 51, 24 Law. Ed. 680. On page 681 the court says: "The officers of each vessel had the right to assume that the other vessel would do its duty," etc.

(15) *Nichels vs. The Servia*, 149 U. S. 144, 37 Law. Ed. 681 (particularly at the bottom of page 686). "The Servia maintained her position close to the New York shore; she proceeded slowly; she observed the Noordland closely; she stopped her engines when at a safe distance to enable



the Noordland to *check her own sternway*; and she reversed her engines when the sternway of the Noordland indicated risk of collision. She was thwarted in her maneuvers by the faults committed by the Noordland. It was not incumbent upon the Servia to take any other precautions than she did; and she did nothing to bring on the risk of collision."

(16) *Belden vs. Chase*, 150 U. S. 674, 37 Law. Ed. 1218 (particularly page 1228, first column) where it appears from the opinion: "The Vanderbilt was bound to go to the right after the bargain was made by the exchange of single whistles." The rules of the supervising inspectors have the force of statutory enactment.

(17) *The Victory*, 168 U. S. 410, 42 Law. Ed. 519 (particularly on page 530, the upper part of the first column), where the court says: "The Plymouthian was entitled to rely on her repeated single blast to correct the error of the Victory until it was made apparent by the further cross signal or from her change of heading that she was persisting in a wrongful course."

(18) *The Wrestler*, 198 Fed. 583. "The collision being fully explained by the clear fault of the Wrestler, there is no reason to be astute in looking for fault on the part of the Transfer. The

cross-libellant contends the Transfer had no right to continue when the Wrestler did not answer her first signal, but I think the Transfer had no ground for failing to understand the intention of the Wrestler until he had received no answer to his second signal, which was immediately repeated. Then it did stop, blew an alarm, and reversed full speed astern. If the failure of the Transfer to stop and reverse sooner had in any way misled the Wrestler, there would have been some reason for inculcating the Transfer, but it did not."

(19) *The Schooner Maggie J. Smith vs. Samuel H. Walker*, 123 U. S. 349, 31 Law. Ed. 175. "Whether it would have been more prudent for the Robinson to take a different course in consequence of the dangerous position in which she was placed by the disregard of the statutory rule on the part of the Smith must depend upon the angle at which the vessels were approaching, their distance apart at the time, their combined speed, circumstances not disclosed in the record." \* \* \*.

It may be asked: What would the Strathalbyn have accomplished by having blown her danger signal earlier? We answer: Absolutely nothing. The Virginian knew the Strathalbyn was approaching her; at least, they so thought at the time. They knew, by her continued whistling, that she desired the co-operation of the Virginian in passing. If

the testimony of the *Virginian's* officers is to be believed in connection with their engine operations, the *Strathalbyn's* danger signal would have done no good, for they say they stopped the engines on the first whistle to the *Virginian* from the *Strathalbyn*, and were going full speed astern when the second whistle was blown; that the jingle of the telegraph almost drowned sound. It was not until the second whistle that the *Virginian's* red light commenced to disappear. The distances then were not such as to involve risk of collision. Of course, Capt. Beecher was not in doubt of the location or course of the *Virginian*. He could see distinctly. And if the *Virginian* were in doubt of the course and location of the *Strathalbyn*, the rules require an immediate notification of that fact by the danger whistle, and, until that danger whistle was blown by the *Virginian*, the *Strathalbyn* had a right to assume that she could be seen and would be properly passed, as long as there was sufficient room for that maneuver. It isn't anything strange, on Puget Sound, for vessels approaching to neglect to answer a passing whistle from another vessel. The record in this case shows that this passing without signals took place in two instances. So we see that there was no real cause of alarm on the part of the *Strathalbyn's* navigator until he blew the danger signal.

Having shown that the Strathalbyn is free from fault, it is not hard to discover the fault in the Virginian. Her officers testify they heard two passing whistles from the Strathalbyn which they knew were intended for her. They knew that the Strathalbyn was approaching her from ahead. They knew that the Strathalbyn had approached the Flyer and had made a port to port passage with the Flyer. They knew there was no other vessel in the vicinity. The engine room log of the Virginian and the testimony of her officers on the bridge are so irreconcilably inconsistent that it is impossible to give credence to the bridge officers' statements. If the bridge officers are not intentionally falsifying, they are surely grossly mistaken. The engineer's testimony describes how signals to the engines are recorded in the engine room log the moment they are given, and the log shows that the stop signal was given at 7:57, the reverse at 7:58, and the collision occurred at 7:58. All the signals were given within the course of one minute. Yet Capt. Green, Mr. Duffy and First Mate McLeod all testify that two minutes or more elapsed after the engines of the Virginian were reversed before the danger signals came (App. 836, 891). We say Mr. Duffy so testifies. Probably in taking the whole of his testimony, that would be the conclusion; but Duffy is a very peculiar witness, and the first time that counsel started Duffy off to

tell his story and questioned him about the signals to the engine (App. 1160), he was asked:

“Q. How was your vessel going when you ordered her full speed astern? A. Full speed ahead.

Q. Did you stop her at any time between full speed astern and full speed ahead? A. No.

Q. Gave her no signal to stop? A. Oh, yes, I stopped her.

Q. When did you stop her? A. When I heard that whistle.

Q. Which whistle? A. The second whistle that I supposed was for me.

Q. You say the second whistle? A. I mean when he whistled to the Flyer.

Q. That is the first whistle? A. That is the first whistle.

Q. That is the first whistle to you? A. I supposed it was for me.

Q. It was at that time you stopped her? A. Yes.”

Then he testifies that he got his glasses and tried to pick up a light and says he didn't see anything.

(App. 1161):

“Q. Then what did you do? A. I ordered her full speed astern.

Q. About how long after you stopped her before you ordered full speed astern? A. Well, it would not be, I do not think, half a minute.”



On page 1162, he was asked:

“Q. State what happened after you heard the danger signal and answered with three blasts?

A. The ships came together. Well, I guess, it did not seem a half a minute. It was not very long.

Q. What was the effect of the blow upon the Virginian? A. It did not seem very much.

Q. Not very strong? A. No.

Q. Did it give the Virginian a list to either side? A. Just barely a list to port.”

(App. 1163):

“Q. Did the blow of the collision throw the Virginian off her course at all? A. Very little.”

Now, the engine room log shows that the Virginian's engines were stopped at 7:57 and went full speed astern at 7:58, when the collision occurred, and the interval that Pilot Duffy gives, of about a half a minute, is likely the correct interval between the stop and the reversing signal, for it does appear from the testimony of Capt. Beecher, Captain Crerar and others on the Strathalbyn that, a few seconds before the steamers collided, it was noticed that the back water was just commencing to show under the counter. The Virginian's engine room log and the testimony of the Strathalbyn's bridge officers harmonize. And it is significant that no whistles came from the

Virginian until after the Strathalbyn had blown her danger whistle. Then the Virginian blew three whistles, which they testified signified her engines were going astern. If the navigators of the Virginian had in mind signifying when the Virginian's engines were going astern by her whistles, and if, as a matter of fact, her engines were reversed two minutes before the danger signal from the Strathalbyn, then we could have expected them to have blown three whistles to indicate that fact two minutes before the danger signal. The rules require them to signal when their engines are running astern, and, in this particular, they violated the rules, if they were running astern two minutes before they signalled. The District Court felt constrained to accept the log of the Virginian as the true story of her engine manipulations. We can see no reason why that record should not be the conclusive one in this case, as it is made under authority of law at the time of the occurrence and is an admission against the interest of the party involved.

Again, the Virginian was negligent in the exercise of good seamanship.

*The Cayuga vs. The Hoboken Land & Improvement Co.*, 14 Wall. 270; 20 Law. Ed. 828, says, among other things, in the opinion: "Persons engaged in navigating vessels upon the seas are

bound to observe the nautical rules enacted by Congress whenever they apply, and in other cases to be governed by the rules recognized and approved by the courts." Admit, for the sake of the argument, that they could not see the Strathalbyn; that they were in doubt as to the course of the Strathalbyn; they knew they were on a regular course followed by all steamers between Tacoma and Seattle. They had heard the Flyer answer the Strathalbyn's first whistle and knew the exact location of the Flyer by her lights, and surmised that the Strathalbyn had passed or was passing her port to port and that the subsequent passing whistles were intended for the Virginian. They, therefore, knew substantially the Strathalbyn's position. It could not be any farther to the westward than the Flyer. It might be farther to the eastward than the Strathalbyn actually was; but the position of the vessels then was such that almost any course taken by any vessel on that run would bring the steamers substantially together. The Strathalbyn blew one whistle. The rules require that each vessel shall port on the exchange of whistles. The Virginian knew that she was expected to exchange whistles. She, therefore, knew she was expected to port. There is not a single situation where whistles would be exchanged under the circumstances that it would not be absolutely safe and required for the Virginian to port. The

safe course of conduct is always the course which is demanded by good seamanship, particularly in case of doubt. Capt. Burley, when asked what he would do under similar circumstances, cited the fact that he would have ported, as, by so doing, he would have gotten farther away from the position that the Strathalbyn would be in by doing as the rules required her to do, viz., port. The course suggested by Capt. Burley (and there is no superior pilot or more experienced one in these waters,) recommends itself for simplicity and safety so strongly that no argument can strengthen the suggestion. The *Virginian*, however, contends that she did not change her course in any manner, and so there is no room for argument that she was negligent in failing to do so, particularly if she could not see the lights of the Strathalbyn, for then she necessarily was in doubt as to the course and direction of the Strathalbyn, and should have tried to place herself as far out of the Strathalbyn's indicated course as it was possible, by every human endeavor, to do. On this phase of the case, it is not necessary to test the accuracy of the testimony of the Strathalbyn's officers, that the *Virginian's* head swung to starboard and followed the Strathalbyn to the point of collision, but as in every other feature of this case, there is direct conflict in the testimony between the crew of the *Virginian* and the crew of the Strathalbyn. The

crew of the *Virginian* testify they held their course after the *Strathalbyn* opened whistle signals with her until the collision. The crew of the *Strathalbyn*, who were watching the *Virginian* and conducting their navigation in view of her maneuver, testify that she swung to port after the whistle signals were opened. Two witnesses on the *Flyer*, *Baumont* and *Hofstetter*, testify that the *Virginian* had the appearance of swinging to port—*Hofstetter* because he saw the lights shining through the port-holes on the starboard side of the *Virginian* open more broadly than when he had looked at them previously, and *Beaumont* because he saw the red light on the *Virginian* disappear. Again, the eye witnesses on the *Flyer* corroborate the testimony of the *Strathalbyn*'s navigators, and we contend that the weight of the evidence and the probabilities of the case show that the *Virginian* took a course to port after the *Strathalbyn* whistled to her. Such navigation was negligent.

In addition to the above, the *Virginian* violated rule 3 of the congressional rules and rule 1 of the pilot rules. Rule 3 and rule 1 are alike so far as rule 3 goes, rule 1 only adding to it.

Rule 1, found on page 6 of the pilot rules, is as follows:

“Rule 1. If when steam vessels are approaching each other, either vessel fails to understand



the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle, THE DANGER SIGNAL."

"Whenever the danger signal is given, the engines of *both steamers shall be stopped and backed* until the headway of the steamers has been fully checked, nor shall the engines of either steamer be again started ahead until the steamers can safely pass each other and the proper signals for passing have been given, answered, and understood."

The following is an excerpt from the testimony of Pilot Duffy, commencing App. 1181:

"Q. That is the first you knew what hit you?

"A. Yes. Well we did not know then what hit us.

"Q. You knew something hit you, didn't you?

"A. Yes, sir.

"Q. You knew you had been afoul of something?

"A. Yes, sir.

"Q. What did you suppose it was?

"A. We supposed it was a ship.

"Q. And you had not been able to pick her up at all during that time?

"A. No.

"Q. When the Flyer gave one whistle and the Stratthalbyn gave one whistle to the Flyer,

you knew that a vessel was whistling to pass the Flyer, didn't you?

"A. Yes; I knew there was something.

"Q. And that those vessels were passing port to port?

"A. Well, I supposed that was what it was.

"Q. That is what you supposed at the time was the case?

"A. Yes, sir.

"Q. Then, when they gave the next whistle from the Strathalbyn, you knew something was coming towards you from Tacoma, didn't you?

"A. Yes.

"Q. And that that whistle was a whistle for your vessel to pass port to port?

"A. Well, I suppose it was.

"Q. At that time you supposed it was?

"A. Yes."

"Q. Now, I suppose you were in some doubt as to what was ahead of you?

"A. Yes.

"Q. I suppose you were in doubt as to the direction that vessel ahead of you was going in, were you not?

"A. Yes, sir.

"Q. You were in doubt as to the course it was taking, too?

"A. Yes, sir.

"Q. And you were in doubt as to the speed she was going?

"A. Yes, sir.

"Q. The only whistles that were blown from your vessel at all were the three whistles that came after you heard the four whistles from the Strathalbyn?

"A. Yes.

"Q. Now, when these whistles were being blown, Captain, the Flyer was in plain sight of you all the time, was she not?

"A. Yes.

"Q. You did not know what they intended to do on board of the Strathalbyn at the time they whistled to you the first time?

"A. No, sir.

"Q. Who was in control of the navigation of the Virginian?

"A. I was pilot.

"Q. You had control?

"A. Yes, sir.

"Q. The man on the bridge who was giving orders and directions?

"A. Yes, sir.

"Q. It was Captain Green who blew the three whistles?

"A. Yes.

"Q. You did not give that direction?

"A. I did not give the direction for blowing the three whistles."

It appears Duffy knew the Strathalbyn was approaching, knew the one whistle signal was for him, and was in doubt as to the course, intention and speed of the Strathalbyn. This produced the exact situation demanding an immediate sounding of the danger signal.

The one idea most prominent in the mind after reading the rules above referred to is that if, for any reason, the Virginian failed to understand the Strathalbyn's course or intention, that the Virginian would immediately blow the danger. Therefore, when no danger was blown from the Virginian, the pilot on the Strathalbyn believed there was no doubt on the part of the Virginian as to the Strathalbyn's course and intention, since the Strathalbyn had opened the signals. The Strathalbyn's pilot, believing there was no danger in continuing on his course indicated by his one blast signal, believing that the Virginian would co-operate in making the port passage, could and should proceed on his course with firmness, and could and should hold it up to the last minute, unless he received a danger signal earlier to indicate the necessity of stopping and backing. The Virginian, therefore, had the whole situation in her hands. Had she blown the danger signal when the Strathalbyn

first blew to the *Virginian* or later, the *Strathalbyn* and the *Virginian* would have then both reversed and the two vessels would not have come together, for, as it was, the *Strathalbyn* and *Virginian* almost cleared. If the *Virginian* had performed the simple operation of tooting the danger signal when in doubt, the collision could not have occurred. The *Virginian* should be held at fault for misleading the *Strathalbyn's* pilot by her silence.

We have not attempted to cover in all detail the testimony of the numerous witnesses examined in this case. We have felt the need of epitomizing the voluminous testimony of numerous witnesses upon many points, and trust we have not unduly extended our remarks. We feel that the case will be better understood by the court after reading the testimony, and that many facts, favorable to the *Strathalbyn*, will occur to the court from such reading that have not been or will not be touched upon herein. We feel that, in so reading the testimony, the court will become thoroughly convinced of the honesty, uprightness and credibility of the witnesses produced by the *Strathalbyn*; that the court will not hesitate to say that, out of the conflict of evidence, the testimony greatly preponderates that the *Strathalbyn's* lights were properly set and burning, that her navigation was prudent, in accordance with the rules and entirely safe had



the Virginian co-operated by observing the rules and exercising good seamanship, and that the Virginian was solely at fault because of her wrongful navigation, the carelessness of her pilot or bridge officers, and the deficiency of her lookout. We respectfully ask that the court find the Virginian wholly at fault.

#### ASSIGNMENT OF ERROR XIV., XV. and XVI.

These assignments can be considered together, and if the court concludes that the Strathalbyn is relieved from liability to the cargo owner by their contract exempting the Strathalbyn from collision damage, then the error is well claimed; otherwise not. We acknowledge that the Harter Act does not relieve the owner of the carrying ship from liability to recoup the vessel held liable by the cargo owner of the carrying ship. The Harter Act has no application to the case at bar for the reason that the whole of the Strathalbyn was chartered, under a time charter, to the American Trading Company, which Company loaded the Strathalbyn and provided her pilot. She is a private carrier, and the relationship between her charterer and her owners is established by the charter party. This charter party exempts the Strathalbyn from liability to the charterer for damage arising from collision. The charterer could not sue the Strathalbyn directly because of his express contract but

could sue the Virginian as there is no express contract between the charterer of the Strathalbyn and the Virginian. When it becomes apparent that, through the operation of law, the Virginian is held at fault and claims the right to recoup from the Strathalbyn one-half of a judgment obtained by the cargo owner against her, at that moment it becomes obligatory upon the court to enforce the express agreement between the charterer and the Strathalbyn and limit the cargo owner's right of recovery to one-half of his loss and find that such one-half of his loss should be solely charged to the Virginian. In this consolidated proceeding, the court has jurisdiction of all the parties prior to rendering judgment, and can pass judgment so provisioned as to carry out, without harm to anyone, the express provisions of the contracts between the parties which are pleaded and admitted herein. We find that the case of *The Maine*, 161 Fed. 401, distinguishes *The New York*, 175 U. S. 187; 44 Law. Ed. 126 (and other cases following the rule there laid down as to the right of the vessel sued by the cargo owner to recoup from a public carrier vessel), from the case of a private carrier, and it was held that the libellant, having contracted for an exemption, was not entitled to recover more than half damages against the Maine, the joint tort-feasor rule not being applicable. We, therefore, submit that the Honorable District Court

was in error in rendering judgment against the Virginian in favor of the cargo owner for more than one-half of the cargo owner's loss, and in decreeing the full amount of the damage against the Virginian, with a provision that the Virginian recoup one-half thereof from the Strathalbyn.

Respectfully submitted,

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